139-470

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1481.

THE UNITED STATES EX REL: MARY ELIZABETH LEVEY, INTERMARRIED WITH GEORGE COLLINS LEVEY, PLAINTIFF IN ERROR,

vs.

STROTHER M. STOCKSLAGER, COMMISSIONER OF THE GENERAL LAND OFFICE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JANUARY 8, 1889.

accession 2584 (2

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1481.

THE UNITED STATES EX REL: MARY ELIZABETH LEVEY, INTERMARRIED WITH GEORGE COLLINS LEVEY, PLAINTIFF IN ERROR,

vs.

STROTHER M. STOCKSLAGER, COMMISSIONER OF THE GENERAL LAND OFFICE.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

INDEX.

	Original.	Print.
Petition for mandamus	1	1
Order to show cause and that cause be heard in general term	9	3
Rule to show cause	10	4
Marshal's return	11	4
Answer and return to rule	12	5
Demurrer to answer	22	8
Judgment	25	9
Bond for writ of error	26	9
Writ of error	29	10
Citation	29	10
Proof of service of citation	29	11
Certificate to record	30	11
Assignment of errors	31	12

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 15, 1889.

1 *Petition for Mandamus. Filed Oct.* 2, 1888.

In the Supreme Court of the District of Columbia, this 2d day of October, A. D. 1888.

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office.
} No. 28978.

To the supreme court of the District of Columbia:

Your petitioner, the said Mary Elizabeth Levey, respectfully represents that she is the identical person who was formerly Mary Elizabeth Bouligny, the widow of John E. Bouligny, deceased, and who is named in the act of Congress passed on the 2d day of March, 1867, and more particularly hereinafter set forth, and that she has, since the passage of said act, intermarried with George Collins Levey, and was, on the 29th day of March, 1888, and now is, his wife.

2 Your petitioner further represents that, in pursuance of the request and claim of the parties thereto, Congress, on the 2d of March, 1867, passed the following act, to wit:

"An act for the relief of the heirs of John E. Bouligny.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and hereby is confirmed to Mary Elizabeth Bouligny, Corrine Bouligny, and Felice Bouligny, widow and children of John E. Bouligny, deceased, the one-sixth part of the land claim of Jean Antoine Bernard D'Autrive, in the State of Louisiana, said one-sixth part amounting to seventy-five thousand eight hundred and forty acres, and that, inasmuch as the said land embraced in said claim *have* (has) been already appropriated by the United States to other purposes, certificates of new location in eighty-acre lots be issued to the said Mary Elizabeth Bouligny for her own benefit and that of her said minor children in lieu of said lands, to be located at

3 any land office in the United States upon any public lands subject to private entry, at a price not exceeding one dollar and twenty-five cents per acre. The Commissioner of the General Land Office is hereby directed to issue said certificates of new location in accordance with existing regulations in such cases." 14 Stats., 635.

Your petitioner further represents that on the 6th day of March, 1867, her attorney filed with the Commissioner of the General Land Office a certified copy of said act of March 2d, 1867, and requested the issuance of the certificates of new location named in said act.

Your petitioner further represents that the said act of March 2d, 1867, was passed by the 39th Congress, which said Congress ad-

1 *Petition for Mandamus. Filed Oct.* 2, 1888.

In the Supreme Court of the District of Columbia, this 2d day of October, A. D. 1888.

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office.
No. 28978.

To the supreme court of the District of Columbia:

Your petitioner, the said Mary Elizabeth Levey, respectfully represents that she is the identical person who was formerly Mary Elizabeth Bouligny, the widow of John E. Bouligny, deceased, and who is named in the act of Congress passed on the 2d day of March, 1867, and more particularly hereinafter set forth, and that she has, since the passage of said act, intermarried with George Collins Levey, and was, on the 29th day of March, 1888, and now is, his wife.

2 Your petitioner further represents that, in pursuance of the request and claim of the parties thereto, Congress, on the 2d of March, 1867, passed the following act, to wit:

"An act for the relief of the heirs of John E. Bouligny.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be and hereby is confirmed to Mary Elizabeth Bouligny, Corrine Bouligny, and Felice Bouligny, widow and children of John E. Bouligny, deceased, the one-sixth part of the land claim of Jean Antoine Bernard D'Autrive, in the State of Louisiana, said one-sixth part amounting to seventy-five thousand eight hundred and forty acres, and that, inasmuch as the said land embraced in said claim *have* (has) been already appropriated by the United States to other purposes, certificates of new location in eighty-acre lots be issued to the said Mary Elizabeth Bouligny for her own benefit and that of her said minor children in lieu of said lands, to be located at

3 any land office in the United States upon any public lands subject to private entry, at a price not exceeding one dollar and twenty-five cents per acre. The Commissioner of the General Land Office is hereby directed to issue said certificates of new location in accordance with existing regulations in such cases." 14 Stats., 635.

Your petitioner further represents that on the 6th day of March, 1867, her attorney filed with the Commissioner of the General Land Office a certified copy of said act of March 2d, 1867, and requested the issuance of the certificates of new location named in said act.

Your petitioner further represents that the said act of March 2d, 1867, was passed by the 39th Congress, which said Congress ad-

journed on the 3d of March, 1867, and that at the next session of Congress, being the 40th Congress, the said 40th Congress, on the 30th of March, 1867, passed the following joint resolution, to wit:

4 "Joint resolution directing the Secretary of the Interior to suspend the execution of a law passed by the Thirty-ninth Congress for the relief of the heirs of John E. Bouligny.

"Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be directed to suspend the execution of the act entitled 'An act for the relief of the heirs — John E. Bouligny,' approved March second, eighteen hundred and sixty-seven, until the further order of Congress." 15 Stat., 353.

Your petitioner further represents that Congress has made no "further order" in said matter.

Your petitioner further represents that the defendant herein, Strother M. Stockslager, was, on the 29th day of March, 1888, and since has been and now is Commissioner of the General Land Office of the United States, and that she, on the 29th day of March, 1888, demanded of him as such Commissioner that he issue to her, for her own benefit and that of her said minor children,

5 Corrine Boulingny and Felice Bouligny, certificates of new location for seventy-five thousand eight hundred and forty acres in eighty-acre lots, locatable at any land office in the United States, upon any public lands subject to private entry, at a price not exceeding one dollar and twenty-five cents per acre, in conformity with the provisions of the said act of March 2, 1867. Said demand was made in writing, at the office of the said Commissioner of the General Land Office, in the city of Washington and District of Columbia. The said Commissioner, on the 12th day of April, 1888, refused to grant said request or any part thereof.

Your petitioner further represents that on the 13th day of April, 1888, she duly appealed from the said decision and refusal of the Commissioner of the General Land Office to the Hon. Secretary of the Interior, and that the said Secretary, on the 3d day of May, 1888, approved the decision of the Commissioner.

6 Your petitioner further represents that no portion of the certificates of new location mentioned in the said act of Congress has ever been issued, and that by the refusal of said Commissioner and by the affirmance of his said decision by the Secretary she is deprived of the power to obtain said certificates or any part thereof, and that she is injured thereby, and that she is entirely without remedy in the premises unless it be now afforded by the interposition of this honorable court.

Your petitioner further represents that she has heretofore repeatedly made application to the Commissioner of the General Land Office for the issuance of said certificates of new location, and has always met with a refusal on their respective parts to issue the same.

Your petitioner therefore prays that a writ of mandamus may

issue against the said Strother M. Stockslager, Commissioner
7 of the General Land Office, and that he may be commanded and directed by this court to execute and deliver to your petitioner, for her own benefit and that of her said minor children, Corrine Bouligny and Felice Bouligny, certificates of new location for seventy-five thousand eight hundred and forty acres in eighty-acre lots, locatable at any land office in the United States upon any public lands subject to private entry, at a price not exceeding one dollar and twenty-five cents per acre, as required by the said act of Congress, and that such other order may be made in the premises as law and justice may require.

MARY ELIZABETH LEVEY,
Formerly Mary Elizabeth Bouligny.

WALTER H. SMITH,
A. T. BRITTON,
A. B. BROWNE,
S. W. JOHNSTON,
Att'ys for Petitioner.

8 I, Mary Elizabeth Levey, the above-named petitioner, being first duly sworn, say that the several matters and things set forth in the foregoing petition are true.

MARY ELIZABETH LEVEY,
Formerly Mary Elizabeth Bouligny.

Subscribed and sworn to before me, Francis W. Frigout, deputy consul general of the United States for the Kingdom of Great Britain, duly authorized and commissioned, this 24th day of July, 1888.

In witness whereof I have hereunto set my hand and the official seal of my office this 24th day of July, 1888.

[SEAL.] FRANCIS W. FRIGOUT,
Deputy Consul General U. S. A., London, England.

9 *Court Proceedings.*

Proceedings before the supreme court of the District of Columbia, holding a special term at law for the month of October, commencing on Tuesday, second day of October, 1888.

TUESDAY, *October* 2, *A. D.* 1888.

By order of Honorable Alexander B. Hagner, justice, one of the justices of said supreme court, presiding, the court is opened by proclamation of the marshal pursuant to rule of court.

* * * * * * *

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levey, *vs.* GEORGE M. STOCKSLAGER, Commissioner of the General Land Office.	At Law. No. 28978.

10 Ordered, That Strother M. Stockslager show cause, on or before the 15th day of October instant, why an alternative

mandamus should not issue as prayed, provided a copy of the said petition and of this order be served upon him on or before the seventh instant.

And this cause is hereby ordered to be heard in general term in the first instance.

Oct. 2d, 1888.

A. B. HAGNER,
Asso. Justice.

Rule to Show Cause. Issued Oct. 2d, 1888.

In the Supreme Court of the District of Columbia, this 2d day of October, 1888.

In Circuit Court.

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office.

At Law.
No. 28978.

11 On reading the petition and affidavit now on file and docketed in the above cause and upon considering the same, it is, this 2d day of October, 1888, ordered that the said respondent, on or before the 15th day of October instant, show cause in the supreme court of the District of Columbia, sitting in general term, why a writ of mandamus should not issue as prayed for by the relator, provided that a copy of said petition and this order be served upon the said respondent before the seventh instant.

By the court.

Teste:
[SEAL.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG, *Ass't Clerk.*

Marshal's Return.

Served copy of the within rule to show cause and also a copy of the petition, &c., for writ of mandamus on Strother M. Stockslager, Commissioner of the General Land Office.

October 2d, 1888.

A. A. WILSON, *Marshal.*

12 *Answer & Return to the Rule to Show Cause. Filed Oct.* 11, 1888.

In the Supreme Court of the District of Columbia, this 11th day of October, A. D. 1888.

THE UNITED STATES *ex rel.* MARY ELIZABETH Levey, Intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office.
} At Law. No. 28978.

In the Supreme Court of the District of Columbia, Sitting in General Term.

Now comes the respondent, Strother M. Stockslager, Commissioner of the General Land Office, by his counsel in this behalf, and for cause and reason why the writ of mandamus prayed for herein should not issue as prayed respectfully shows unto the court that he has been served with an order or rule from the
13 honorable court requiring him to show cause why a writ of mandamus should not be issued from said court, directed to him as Commissioner of the General Land Office, upon the petition of Mary Elizabeth Levy, intermarried with George Collins Levy, the relator herein, commanding this respondent to execute and deliver to said petitioner and relator, for her own benefit and that of her minor children, Corine Bouligny and Felice Bouligny, certificates of new location for seventy-five thousand eight hundred and forty acres, in eighty-acre lots, locatable at any land office in the United States upon any public lands subject to private entry, at one dollar and twenty-five cents per acre, as required by the act of Congress of 2d of March, 1867 (14 Stat. at L., 635), which acts is fully set out in the petition, and that such other order may be made in the premises as law and justice may require.

The respondent, answering, says that Congress, on the 2d day of March, 1867, passed the act for the relief of the heirs of John E. Bouligny, a copy of which is fully set out in the petition as
14 aforesaid; but it is averred by the respondent that, as he verily believes, no action had been taken by the General Land Office for the purpose of carrying out and giving effect to the provisions of said act, nor had any of the certificates of new location, as therein provided, been executed, issued, or delivered up to and including the 30th day of March, 1867, a period of twenty-eight days after the passage of said act, and on the said 30th day of March, 1867, Congress suspended the execution of said act of March 2, 1867, by the passage of a joint resolution, which reads as follows:

Joint resolution directing the Secretary of the Interior to suspend the execution of a law passed by the Thirty-ninth Congress for the relief of the heirs of John E. Bouligny.

Be it resolved by the Senate and House of Representatives of the

United States of America in Congress assembled, That the Secretary of the Interior be directed to suspend the execution of the act
15 entitled "An act for the relief of the heirs of John E. Bouligny," approved March second, eighteen hundred and sixty-seven, until the further order of Congress.

Approved March 30, 1867.

That by reason of the passage of the joint resolution as aforesaid the power of the respondent to execute, issue, and deliver, to the heirs of said John E. Bouligny the said certificate of new location was suspended until the further order of Congress; that Congress has made no further order nor has it taken any action looking to the revival of the act of March 2, 1867, nor has the legislative inhibition contained in the said joint resolution against the issuance of the certificates of new location been removed, but the same remains in full force.

The respondent has no knowledge that the relator or the heirs of John E. Bouligny, on the 6th day of March, 1867, by attorney, requested the issuance of the certificates of new location under the act of March 2, 1867.

16 The respondent admits that he was, on the 29th day of March, 1888, and since has been and now is, Commissioner of the General Land Office of the United States; also that the relator, on the 29th day of March, 1888, as alleged, applied for the issuance of the certificates of new location under the act of March 2d, 1867; but he avers that such application was denied by him on the 12th day of April, 1888, for the reason that by the joint resolution of Congress, approved March 30, 1867, the Secretary of the Interior was directed to suspend the execution of the act of March 2, 1867, until the further order of Congress, and as said act of Congress still remains in suspension by force of the joint resolution aforesaid, no action can, as he verily believes, properly be taken by the respondent; also that an appeal was taken, as alleged, to the Secretary of the Interior, by whom the decision of the respondent was affirmed.

The respondent likewise admits that no portion of the cer-
17 tificates of new location have been issued under the said act of March 2, 1867, so far as he knows and believes.

The said respondent specifically avers as follows:

1. That no certificates of new location, as he verily believes, were issued by the Commissioner of the General Land Office under the act of March 2d, 1867, prior to the passage by Congress of the joint resolution directing the suspension of said act on March 30, 1867.

2. That since the passage of said joint resolution, to wit, March 30, 1867, he has had no power or jurisdiction, as he believes, under the law, to execute, issue, and deliver to the relator or to the heirs of John E. Bouligny such certificates of new location under the act of March 2, 1867.

3. That the joint resolution passed March 30, 1887, is the last expression of Congress upon the subject; Congress has made
18 no further order, and the act of March 2, 1867, remains thereby repealed or suspended.

4. That the act of March 2d, 1867, did not, as he believes, give nor grant to the relator nor to the heirs of John E. Bouligny a vested right to the certificates of new location *in præsenti*, and inasmuch as such certificates were never executed, issued, and delivered no right or title therein has been vested in the relator nor in the heirs of said Bouligny under such act.

5. The relator and the heirs of said Bouligny have, as he believes, no property right in such certificates of new location, under said act nor otherwise, until the same shall have been executed, issued, and delivered to them or to their legal representatives or agents.

6. The Commissioner of the General Land Office is directed by the act of March 2d, 1867, to issue such certificates of new
19 location in accordance with existing regulations in such cases, which, in the event the joint resolution of March 30, 1867, had not been suspended, the act aforesaid would have conferred upon this respondent, as he verily believes, under the law, the performance and exercise of an official duty, within his judgment and discretion, which is not reviewable by nor within the jurisdiction and control of this honorable court.

7. The respondent also avers that, as he verily believes, the official duty to be discharged by the Commissioner of the General Land Office, under the act of March 2, 1867, "in accordance with existing regulations in such cases," is not a ministerial duty.

8. The respondent further avers that if the relator had acquired a vested right to or property in the certificates of new location under the act of March 2, 1867 (which is not admitted), a remedy
20 was afforded in the Court of Claims, under § 1059, to recover the value thereof, provided the petition setting forth the claim had been presented to the court within six years after such claim first accrued.

For the reasons set forth, which respondent trusts will be obvious to the court, as well as for such other reasons as to the court may seem proper, the respondent respectfully objects to the jurisdiction assumed in this case.

As to any other matter or material allegation set forth in said petition not particularly responded to in this answer or return the respondent denies the same and submits the issue to the honorable court.

Wherefore the respondent respectfully submits that it is not competent for this court to issue its writ of mandamus in this case, and prays that the rule may be discharged and the petition dismissed.

S. M. STOCKSLAGER,
Commissioner of the General Land Office.

HERBER J. MAY,
Attorney for Respondent.

21 DISTRICT OF COLUMBIA, } *ss:*
County of Washington, }

I, Strother M. Stockslager, being duly sworn according to law, depose and say that I have read the foregoing response by me sub-

scribed and know the contents thereof; that the matters therein stated upon my knowledge are true, and the matters stated therein upon information and belief I believe to be true.

S. M. STOCKSLAGER,
Commissioner of the General Land Office.

Subscribed and sworn to before me and in my presence this 9th day of Oct., A. D. 1888.

[SEAL.] N. D. ADAMS,
Notary Public, District of Columbia.

H. J. MAY,
Att'y for Respondent.

22 *Demurrer to Answer. Filed Oct.* 17, 1888.

In the Supreme Court of the District of Columbia, this 17 day of October, 1888. In General Term.

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levy,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office.
} At Law. No. 28978.

And now comes the above-named relator and says that the answer and return of the said respondent to the rule to show cause why a mandamus should not be issued against him as prayed for is bad in substance.

WALTER H. SMITH,
A. T. BRITTON,
A. B. BROWNE,
S. W. JOHNSTON,
Att'ys for Petitioner.

23 And this relator further says that upon the hearing of the aforesaid demurrer it will be argued by said relator as matter of law that said answer and return does not set up any legal defense to the aforesaid petition of this relator; that the same is insufficient in law; that the remedy suggested by the said answer and return by proceedings in the Court of Claims does not exist in law; that the right in said certificates of location given by said act of Congress was a vested right and could not and was not taken away by the said joint resolution; that said joint resolution was unconstitutional and void; that the following claim in said answer and return, to wit, "As to any other matter or material allegation set forth in said petition not particularly responded to in this answer or return the respondent denies the same and submits the issue to

the honorable court," is not authorized by law, in that it is
24 too general and does not specify with particularity the allegations of the petition or any of them which are deemed material, but leaves to the court to ascertain what allegations are thereby denied; and that the said answer and return by reason of the aforesaid matters is insufficient in law.

Court Proceedings.

Proceedings before the supreme court of the District of Columbia, sitting in general term, beginning the first Monday, October 1, 1888.

MONDAY, *October* 1, 1888.

Present, presiding: Mr. Chief Justice Bingham, and Justices Cox, James, Hagner, & Merrick.

* * * * * * *

MONDAY, *January* 7, 1889.

Session resumed pursuant to adjournment.
Present: Chief Justice Bingham and Justice James.

* * * * * * *

25 *Mandamus.*

U. S. *ex rel.* MARY E. LEVEY
vs.
Commissioner of the General Land Office, STROTHER M. STOCKSLAGER, *Com'r.* } Law. 28978.

Mr. Justice James announces the opinion of the court refusing mandamus.

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office. } At Law. No. 28978.

This 7th day of January, 1889, this cause came on to be heard upon the demurrer of the relator to the return and answer of the respondent, and was argued by counsel. On consideration
26 thereof the court, being fully advised in the premises, doth overrule the said demurrer, and, the said relator electing to stand upon her demurrer, it is considered by the court that the said rule be, and the same is hereby, discharged and said petition dismissed, and that the said relator pay the costs made in this suit and proceeding.

E. F. BINGHAM,
Chief Justice.

Bond for Writ of Error. Filed Jan'y 8, 1889.

In the Supreme Court of the District of Columbia, the 8th day of January, 1889.

THE UNITED STATES *ex Relatione* MARY ELIZABETH LEVEY, Intermarried with George Collins Levey, *vs.* STROTHER M. STOCKSLAGER, Commissioner of the General Land Office. } At Law. No. 28978.

In error.

Know all men by these presents that we, Horace J. Gray
27 and Walter H. Smith, are bound unto the above-named Strother M. Stockslager, Commissioner of the General Land Office, in the sum of five hundred dollars, to be paid to the said Strother M. Stockslager, Commissioner of the General Land Office, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of January, 1889.

Whereas the above-named The United States *ex relatione* Mary Elizabeth Levey, intermarried with George Collins Levey, has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is that if the above-named relator shall prosecute her said suit to effect and
28 answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HORACE J. GRAY.
WALTER H. SMITH.

Sealed and delivered in presence of—

——— ———.

Bond approved Jan'y 8, 1889.

E. F. BINGHAM,
Chief Justice.

29 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, between The United States *ex rel.* Mary Elizabeth Levey, intermarried with George Collins Levey, *vs.* Strother M. Stockslager, Commissioner of the General Land Office, being No. 28978, law, a manifest error hath

happened, to the great damage of the said relator, as by her complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 8th day of January, in the year of our Lord 1889, and of the Independence of the United States the one hundred and thirteenth.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk.*

DISTRICT OF COLUMBIA, *To wit:*

To Strother M. Stockslager, Commissioner Gen'l Land Office:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Mary Elizabeth Levey is plaintiff and you are defendant, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, so that speedy justice be done the parties in that behalf.

Witness E. F. Bingham, chief justice of the said supreme court of the District of Columbia.

E. F. BINGHAM,
Chief Justice.

Service acknowledged this 8th day of January, 1889.

HEBER J. MAY,
Attorney for Respondent.

[Endorsed:] No. 28978. Law. United States *ex rel.* Mary E. Levey, &c., *vs.* Strother N. Stockslager, Com'r, &c. Copy of writ of error lodged in clerk's office. Filed Jan. 8, 1889. R. J. Meigs, clerk.

30 AUTHENTICATION OF RECORD.

Clerk's Certificate.

CLERK'S OFFICE,
SUPREME COURT OF THE DISTRICT OF COLUMBIA.

I, Return J. Meigs, clerk of the said court, do hereby certify that the writings annexed to this certificate are true copies of originals on file and of record in said office, and that said originals together

constitute the record of the proceedings of said court in this cause.

Witness my hand and the seal of said court this 8th day of January, 1889.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

Justice's Certificate.

I, E. F. Bingham, chief justice of said court, do certify the foregoing attestation by Return J. Meigs, clerk of the said court, to be in due form.

Witness my hand and seal this 8th day of January, 1889.

E. F. BINGHAM, [SEAL.]
Chief Justice.

Clerk's Certificate to Justice's Official Character.

I, Return J. Meigs, clerk of said court, hereby certify that E. F. Bingham, whose genuine signature is subscribed to the foregoing certificate, was, at the time of signing and attesting the same, chief justice of said court, duly commissioned and qualified.

Witness my hand and the seal of said court this 8th day of January, 1889.

[Seal Supreme Court of the District of Columbia.]

R. J. MEIGS, *Clerk*,
By J. R. YOUNG,
Assistant Clerk.

[Endorsed:] Authentication of record.

31 In the Supreme Court of the United States.

And now comes the said relator and says that in the record and proceedings aforesaid there is manifest error, in this, to wit:

The said supreme court of the District of Columbia erred—

1st. In overruling the demurrer to the return and answer of the respondent.

2d. In not granting the writ of mandamus as prayed for by the said relator.

Wherefore she prays that the judgment of the said court may be reversed, and that she may be restored to all things she has lost by reason thereof.

WALTER H. SMITH,
Att'y for Relator.

Endorsed on cover: Dist. of Columbia supreme court. No. 1481. The United States *ex rel.* Mary Elizabeth Levey, intermarried with George Collins Levey, plaintiff in error, *vs.* Strother M. Stockslager, Commissioner of the General Land Office. Filed January 8, 1889.

Supreme Court of the United States.

No. 1481.

THE UNITED STATES, *Ex Relatione* MARY ELIZABETH LEVY, *Intermarried with* GEORGE COLLINS LEVY, *vs.* STROTHER M STOCKSLAGER, *Commissioner of the General Land Office.*	*In Error to the Supreme Court of the District of Columbia.*

Now comes the said relator and moves the Court to advance this cause and set it down for argument at some convenient day of the present term for the reasons hereinafter stated.

This case is an application for a writ of mandamus to compel the respondent to issue certificates of new location for 75,840 acres of public land in 80 acre lots, locatable at any land office in the United States, upon any public land subject to private entry at not exceeding one dollar and twenty-five cents per acre, as required to do by a statute passed March 2, 1867, by the 39th Congress, which is as follows:

"*An act for the relief of the heirs of John E. Boulingny.*"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there be and hereby is confirmed to Mary Elizabeth Bouligny, Corrine Bouligny and Felice Bouligny, the widow and children of John E. Bouligny, deceased, the one-sixth part of the land claim of Jean Antoine Bernard d'Autrive, in the State of Louisiana, said one-sixth part amounting to seventy-five thousand eight hundred and forty acres; and that, inasmuch as the said land embraced in said claim *have* (has) been already appropriated by the United States to other purposes, certificates of new location in eighty acre lots, be issued to the said Mary Elizabeth Bouligny for her own benefit and that of her said minor children, in lieu of said lands, to be located at any land office in the United States, upon any public land subject to private entry at a price not exceeding one dollar and twenty-five cents per acre.

"The Commissioner of the General Land Office is hereby directed to issue said certificates of new location, in accordance with existing regulations in such cases." (14 Stat., 635.)

At the next Congress, the 40th Congress, the following Joint Resolution was passed, to wit:

"*Joint Resolution directing the Secretary of the Interior to suspend the execution of a law passed by the Thirty-Ninth Congress for the relief of the heirs of John E. Bouligny.*"

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled*:

"That the Secretary of the Interior be directed to suspend the execution of the act entitled; 'An Act

for the relief of the heirs of John E. Bouligny,' approved March second, eighteen hundred and sixty-seven until the further order of Congress."

15 Stat., 263.

The respondent relies upon this joint resolution as her excuse and defense for not issuing the certificates of new location mentioned in the act of March 2, 1867. And the only question in the case is as to the validity of this joint resolution.

On the part of the relator, it is claimed that she has a vested right in the scrip, and that it cannot be taken away without "due process of law," and that the joint resolution is not such "due process of law."

On the part of the respondent it is claimed that the joint resolution is valid and binding upon him.

The reasons for advancing the case are, first, that the respondent is a public officer, and that the suit will abate by his death or resignation, which is liable to occur at any time; and second, because, by reason of the change in the administration, which will take place on the 4th of March next, it is reasonably certain that he will not remain Commissioner of the General Land Office long after that date.

The Supreme Court below refused the writ and dismissed the petition.

WALTER H. SMITH,

January 10th, 1889. *Att'y for Relator.*

Office Supreme Court U. S.
FILED,
JAN 22 1889
JAMES H. McKENNEY.
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, ON RELATION of Mary Elizabeth Levey, intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, COMMISSIONER of the General Land Office.
} No. 1481.

PETITION FOR WRIT OF MANDAMUS.

WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, ON RELATION of Mary Elizabeth Levey, intermarried with George Collins Levey,
vs.
STROTHER M. STOCKSLAGER, COMMISSIONER of the General Land Office.
No. 1481.

PETITION FOR WRIT OF MANDAMUS.

WRIT OF ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT.

STATEMENT.

The relator filed her petition in the supreme court of the District of Columbia, praying for a writ of mandamus against the respondent (Rec., p. 1).

A rule was made against the respondent to show cause why the writ should not be issued as prayed (Rec., pp. 3, 4).

The answer and return were made by the respondent in accordance to the rule of the court (Rec., p. 5).

The relator's counsel filed a demurrer to the answer and return of the respondent (Rec., p. 8).

The case was heard in the court below in general term in the first instance, and the demurrer was, upon the consideration of the court, overruled and the writ of mandamus refused. The relator elected to stand upon her demurrer (Rec., p. 9).

Upon this decision of the court error has been assigned (Rec., p. 12).

The questions raised by the demurrer, and which are to be re-argued here, may be specifically stated as follows:

(1) That the answer and return do not set up any legal defense to the petition.

(2) That the same is insufficient in law.

(3) That the remedy suggested by the said answer and return, by proceedings in the Court of Claims, does not exist in law.

(4) That the right in the certificates of location, given by the act of Congress, was a vested right, and could not be and was not taken away by the joint resolution.

(5) That the joint resolution was unconstitutional and void.

(6) That the following clause in the answer and return, to wit, "As to any other matter or material allegation set forth in said petition, not particularly responded to in this answer or return, the respondent denies the same and submits the issue to the honorable court," is not authorized by law in that it is too general, etc.

BRIEF OF ARGUMENT.

I.

A paragraph of the answer and return of the respondent is first attacked by counsel for the petitioner.

The petition alleges that—

> Your petitioner further represents that on the 6th day of March, 1867, her attorney filed with the Commissioner of the General Land Office a certified copy of said act of March 2, 1867, and requested the issuance of the certificates of new location named in said act.

The answer to this in the return states that—

> The respondent has no knowledge that the relator, or the heirs of John E. Bouligny, on the 6th day of March, 1867, by attorney, requested the issuance, etc., of the certificates of new location under the act of March 2, 1867.

We do not attach the same importance to this matter that counsel for petitioner do. It is admitted in the petition that the certificates of location were never issued. A mere presentation of a copy of the act of March 2, 1867, could not add to the force of the act, nor could the request that the certificates should be issued have any especial significance. It could not amount to the acceptance of a thing that was not ready to be delivered or accepted. The certificates of location were the things to be accepted or rejected at the proper time. These had not been issued on the 6th of March, 1867, and as a matter of fact they never have been issued.

The answer and return were made by the respondent in accordance to the rule of the court (Rec., p. 5).

The relator's counsel filed a demurrer to the answer and return of the respondent (Rec., p. 8).

The case was heard in the court below in general term in the first instance, and the demurrer was, upon the consideration of the court, overruled and the writ of mandamus refused. The relator elected to stand upon her demurrer (Rec., p. 9).

Upon this decision of the court error has been assigned (Rec., p. 12).

The questions raised by the demurrer, and which are to be re-argued here, may be specifically stated as follows:

(1) That the answer and return do not set up any legal defense to the petition.

(2) That the same is insufficient in law.

(3) That the remedy suggested by the said answer and return, by proceedings in the Court of Claims, does not exist in law.

(4) That the right in the certificates of location, given by the act of Congress, was a vested right, and could not be and was not taken away by the joint resolution.

(5) That the joint resolution was unconstitutional and void.

(6) That the following clause in the answer and return, to wit, "As to any other matter or material allegation set forth in said petition, not particularly responded to in this answer or return, the respondent denies the same and submits the issue to the honorable court," is not authorized by law in that it is too general, etc.

BRIEF OF ARGUMENT.

I.

A paragraph of the answer and return of the respondent is first attacked by counsel for the petitioner.

The petition alleges that—

> Your petitioner further represents that on the 6th day of March, 1867, her attorney filed with the Commissioner of the General Land Office a certified copy of said act of March 2, 1867, and requested the issuance of the certificates of new location named in said act.

The answer to this in the return states that—

> The respondent has no knowledge that the relator, or the heirs of John E. Bouligny, on the 6th day of March, 1867, by attorney, requested the issuance, etc., of the certificates of new location under the act of March 2, 1867.

We do not attach the same importance to this matter that counsel for petitioner do. It is admitted in the petition that the certificates of location were never issued. A mere presentation of a copy of the act of March 2, 1867, could not add to the force of the act, nor could the request that the certificates should be issued have any especial significance. It could not amount to the acceptance of a thing that was not ready to be delivered or accepted. The certificates of location were the things to be accepted or rejected at the proper time. These had not been issued on the 6th of March, 1867, and as a matter of fact they never have been issued.

It is to be presumed the Commissioner of the General Land Office had received through the proper channel a copy of the act of March 2, 1867, knew its provisions, and the duty devolving on him under it, and would have executed the law, regardless of any presentation thereof or request concerning the same on the part of the relator, had it not been suspended or repealed.

It has been held in one of the authorities relied on by counsel for petitioner that "it is not requisite to the issuing of a mandamus commanding public officers to perform official duties neglected by them, that the complainant should have previously demanded of them to perform their duty." (37 Pa. State, 237.)

If this is the law, the allegation under consideration is an immaterial one. And is it not immaterial in any view that may be taken of it?

If this allegation were depended upon for the rule to show cause, would the order have been made? Certainly not; the demand, if any was made, was not followed up until the remedy of the petitioner had been exhausted in the Interior Department. The allegation, therefore, that the relator, by attorney, presented a copy of the act, and requested the issuance of the certificates, without the further allegation that the Commissioner of the General Land Office had decided against her, and that an appeal was taken from such decision to the Secretary of the Interior, by whom it was affirmed, is immaterial for any of the purposes of this case, for the reason that the petitioner did not at that time exhaust her remedy. So, as we understand it, the sufficiency of the respondent's return must be determined upon the material allegations of the

petition, and not upon the answer to the immaterial one, about which this controversy has been raised by counsel on the other side.

But, judging from the allegation of the petition, the presentation of the act and the request must have been very informal, inasmuch as it was not made in writing, nor is the name of the attorney disclosed. Counsel are very particular to allege in the petition that the subsequent demand upon this respondent was made in writing. It is only the original alleged verbal demand about which the respondent never had any official, personal, or positive knowledge, and in relation to which the allegations of the petition are indefinite, uncertain, and not sufficiently specific, that any question is made in the pleadings. No doubt it would be troublesome to make the proof on this point, and hence it would be more agreeable to avoid it. We endeavored in the return of the respondent to answer this immaterial allegation of the petition specifically and with sufficient certainty.

In any event we think the statement in the return that the respondent has no knowledge of the facts alleged, is a good answer to an indefinite and bad allegation in the petition. In other words, a bad answer is good enough for a bad declaration.

> It would seem that in as far as any presumption or interdment is exercised in construing a return, it should ordinarily be in favor of, and not against, its sufficiency.
>
> But as regards the sufficiency of the return it is enough that it contains a full and certain answer to all the allegations expressly made, and that it dis-

closes a fair, legal reason why the mandamus should not be obeyed. (High's Extraordinary Remedies, sec. 461, p. 330; *Springfield* v. *County Commissioners*, 10 Pickering, 59.)

We contend that the return is a full, fair, and complete answer to the material allegations of the petition, and discloses a legal reason why the mandamus should not be obeyed.

The character of the petition and return is such that the latter should be considered by the court as a whole, and not by paragraphs.

The strict rule of pleadings which obtained in mandamus at the common law, prior to the statute of Anne, when no pleadings were allowed beyond the return, and when such return was not traversable, has long since been abolished, and I am pleased to see that counsel make the acknowledgment that "the more modern practice does not require so great strictness."

And I do not believe an authority can be produced that was recognized in the days when the strictest rule prevailed that will extend as far as counsel for the petitioner now ask this honorable court to go in its rulings. (High's Extra. Remedies, sec. 478, p. 342.)

For the history of the law relaxing the strict rules formerly applicable to the return and answer to the alternative writ of mandamus, the court is referred to High's Extraordinary Remedies, Chap. VII, Pt. II, sec. 457, *et seq.*

But, notwithstanding these matters, this allegation of the petition has been denied in another paragraph of the return, which has, however, been demurred to by counsel for the relator.

II.

It is now in order to examine this branch of the subject. A demurrer is especially interposed to the following paragraph of the answer, because it is alleged to be bad pleading, namely:

> As to any other matter or material allegation set forth in said petition, not particularly responded to in this answer or return, the respondent denies the same, and submits the issue to the honorable court.

It is contended that this paragraph is not single, or direct, or certain; that it imposes on the court the burden of searching out its proper application. Inasmuch as counsel for the petitioner have only found one or two paragraphs of the petition that they claim have not been specifically answered in the return, we must thank them for thus having removed the burden from the court of making any such contemplated search.

But to sustain the contention that the answer must be single, direct, and certain, counsel rely on authorities that announce the strict rules of the common law, which were in force before a relaxation of such rules took place.

For instance, *Harwood* v. *Marshall* (10 Maryland, 451) is cited by counsel. The court held that the proceeding in mandamus in Maryland was governed by the ancient principles of the common law. The statute of 9th Anne, and subsequent enactments, had not been adopted by the legislature of Maryland. The relator was left to his remedy by action for false return.

But the return was held bad because it was evasive, and for no other reason. It was not, in any sense, similar to the paragraph demurred to by the petitioner.

All that is decided in *Commonwealth* v. *Commissioners* (37 Penna. State, 237) is that respondents are bound to return plain and direct answers to all *material* allegations. It is insisted that this has been done.

In some of the States it is held that even in the absence of similar statutes to 9th Anne, chapter 20, and 1 William IV, chapter 21, the rule of the ancient common law does not obtain, but that the rights of the parties may be determined in one and the same controversy. (*Fitzhugh* v. *Custer*, 4 Texas, 391.)

It is safe, however, to assert that the proceedings in mandamus in the District of Columbia, as elsewhere in this country, and in England, are now "regarded in the nature of an action, to which the parties may plead as in other actions." (High's Extrao. Remedies, § 459, p. 329.)

If this is not a correct view of such proceedings in the District, and counsel for the petitioner wish to rely on the doctrine in 10th Maryland, *supra*, then they must abandon the demurrer and rely on their remedy by action for a false return, under the strict and ancient common-law rule.

But the same authority by which counsel for the relator interpose a demurrer may be invoked by the respondent in the abrogation of the ancient, arbitrary, and unsatisfactory common-law rules, and for the adoption of the modern and uniform proceedings in ordinary personal actions, so far as the pleadings are concerned, and by which the rights of the parties may be determined.

If under rule 31 of the supreme court of the District of Columbia the petitioner may, regardless of the rule of law announced in 10th Maryland, *supra*, demur, then

there is no good reason why the respondent may not make his return and answer according to rule 27 of said court, and the other rules in *pari materia*, which do not require such singular, direct, and certain averments as contended for by counsel.

III.

The claim of the relator could have been transmitted to the Court of Claims under section 2 of the Bowman Act for an opinion (22 Stat. L., 485); or, with the consent of the petitioner or claimant, it could have been transmitted to said court under section 12 of "an act to provide for the bringing of suits against the Government of the United States" (24 Stat. L., 507).

These are remedies afforded the petitioner as a part of the proceedings in the Executive Department. Whether they should have been exhausted before the petitioner is entitled to the writ of mandamus, *quere?*

The point as to the jurisdiction of the Court of Claims under section 1059, Revised Statutes, was not intended to be seriously pressed on behalf of the respondent. But if vested rights were acquired in the certificates of new location by the petitioner, as claimed by her counsel, and such certificates were not delivered upon demand, would not the petitioner, under a familiar principle of law, be entitled to the money instead of the certificates? For if a note is made payable in merchandise, and upon maturity the merchandise is demanded and payment therein refused, then the holder of the note would be entitled to recover in money. It is denied that such vested rights accrued. But it was upon the theory of counsel for petitioner in

this respect that we were impressed with the idea that the petitioner had a remedy at law, upon an implied contract, or upon a claim founded upon a law of Congress under section 1059 of the Revised Statutes. And we are not yet prepared to say that counsel have not, upon their own contention, brought themselves within this rule and within the jurisdiction of the Court of Claims, provided the bar of the statute of limitation does not apply.

IV.

Under this point will be discussed the question as to whether the petitioner has, by virtue of the act of March 2, 1867, acquired any vested rights to the certificates of location that were proposed to be issued under its provisions. The statute was purely a remedial one, and it was passed for the relief of the heirs of John E. Bouligny.

The execution of the act was, by a joint resolution, suspended until the further order of Congress. It is argued that the effect of the joint resolution was simply to apply to the session of Congress at which it was passed. But the resolution does not express any such intention, but, on the contrary, Congress is spoken of in the general terms in which that body is referred to regardless of any particular session.

The provisions of the resolution do not limit the "further order of Congress" to any particular session or time, but are unlimited in terms, and they can not therefore be confined, either as to time or to any special session of Congress. It is an expressed suspension of the act of March 2, 1867, until some further action is taken by the Congress of the United States, and, if Congress shall never

remove the order of suspension, it is effectually a repeal of the act. It is impossible to see how any other construction can be given to the resolution. An order or resolution is as fully authorized by the Constitution as a bill, and we do not see why such an enactment should not be given the same force and effect when it has been approved by the President.

The intention of Congress is clearly expressed. The language of the resolution is free from ambiguity. By the suspension of the act of March 2, 1867, the relator's remedy is, for the time, extinguished, and may hereafter be revived by Congress. But if Congress shall not revive the remedy by its further order it will remain extinguished for all time. The question of reasonable time is not therefore presented for consideration. Whatever may be the rule of law upon this point, it does not apply to Congress in the consideration of business pending before it. And no authority can be found where the rule has thus been applied. It would be an innovation upon the constitutional powers of Congress for the courts to invoke or attempt to enforce such a rule.

V.

It is asserted by counsel for relator that the act of March 2, 1867, is a legislative confirmation and grant, such as was declared in *Whitney* vs. *Morrow* (112 U. S., 693). An examination of the respective acts of Congress will dispel any such conclusion. The act upon which *Whitney* vs. *Morrow* depended will be found in 3 Stat. L., page 724. The case was twice considered by the Supreme Court.

(*Morrow* vs. *Whitney*, 95 U. S., 551; *Whitney* vs. *Morrow*, 112 U. S., 693.)

What the Supreme Court said in the first case is as follows:

> Confirmation is a conveyance of an estate or right in lands to one who has the possession or some estate therein. The tract confirmed appears to have had clearly defined boundaries, or to have been at least capable of identification; and, if such were the case, the confirmation perfected the claimant's title. A subsequent patent would only have served as documentary evidence of that title. (*Ibid.*, 554.)

The same principle was announced in *Whitney* vs. *Morrow* (112 U. S., 695).

The act for the relief of the Bouligny heirs is entirely distinguishable from the one considered in the cases above cited.

The act consists of three clauses, the first of which is descriptive of an old claim. They may be stated as (1) a confirmation to the heirs of Bouligny of the one-sixth part of the land claim of Jean Antoine Bernard d'Autrive, in the State of Louisiana, amounting to 75,840 acres; (2) inasmuch as the land embraced in the said claim had been appropriated by the United States, certificates of new location in 80-acre lots were to be issued to the said heirs in lieu of said lands, to be located on any public lands in the United States subject to private entry, and (3) that the Commissioner of the General Land Office is directed to issue such certificates according to the existing rules in such cases.

It will be observed that Congress did not give away any lands by metes and bounds. It simply described an old land claim. And as the land had been taken by the United States for some purpose or other, a remedy was afforded by which other lands might be acquired upon the issuance of certificates of new location. The heirs of Bouligny had no property or estate in the new certificates, nor in the lands to be acquired thereunder at the date of the passage of the relief act, and consequently there was no possession or estate therein to be confirmed. There was not, most assuredly, a grant of lands yet to be described and located. And it is equally clear that there was not a grant of a thing which was simply directed to be issued. And as a matter of fact the statute does not make a grant of any kind. It simply describes an old land claim, and provides for the relief of the petitioners. It does not make a grant of property, nor does it confirm a grant already in existence, belonging to the relator either as a possession or an interest in an estate.

There is a clearly defined difference between a grant or confirmation of a title and the unambiguous provisions of a remedial act by which a title may be acquired. The difference is apparent in this case; so is the intention of Congress.

But suppose the act of March 2, 1867, had not been suspended by Congress, could the respondent, as the proper officer of the Government, have been required by a writ of mandamus from this court to perform a duty which Congress has simply "directed" to be done "in accordance with existing regulation in such cases?" In

other words, is not this a directory instead of a mandatory statute?

In the case of *Tameling* vs. *U. S. Freehold Co.* (93 U. S. R., 563), there was a confirmation by Congress of a grant of lands described by metes and bounds. The title and possession had been acquired in a regular way under the law (12 Stat. L., 71). The important questions in this case, as in the Maxwell land-grant case in which it is cited, are as to boundaries and quantities. We are not contesting the power of Congress to confirm a grant, or to make a grant, of lands over which it has the title and control. But we say no grant or confirmation was made by the act now under consideration. Neither the acts of Congress nor the facts upon which the decisions in the cases above cited depend are analogous to the act or the facts in this case. The decisions are not, therefore, applicable here.

VI.

Did the act of March 2, 1867, give the widow and minor children a vested right in the scrip, which was never executed or issued to them?

Counsel for relator maintain that it did, by way of contract, and produce the authorities upon which they rely. It is admitted that the scrip was not issued; that the act was not executed by the Commissioner of the General Land Office. Under these circumstances there could have been no delivery and acceptance. It follows therefore that the proceedings in the case at bar fall short of vested rights upon contract. None of the authorities

cited have held that vested rights accrued upon such a state of facts and circumstances as are depended upon in this case; and inasmuch as counsel have based their claim upon a vested right in the scrip, it is not necessary to make more than a passing reference to the authorities upon the subject of grants of real estate.

Fletcher v. *Peck* (6 Cranch, 87) is not, upon the statement of counsel, nor as a matter of fact, analogous to the case at bar. There was a complete sale and transfer of the possession of the realty in that case, which a future act of the legislature attempted to abrogate. There it was the question of the impairment of a contract. Here no contract existed. There was no obligation on the part of Bouligny's heirs to have accepted the scrip, had it been issued and tendered to them. The transaction never had the form or semblance of a contract. It certainly was not an executed contract, and it never embraced a single element of an executory one.

Dartmouth College v. *Woodward* (4 Wheat., 518) follows *Fletcher* v. *Peck*, *supra*, and holds that a grant becomes a contract as soon as it is accepted. Mr. Justice Story announces the same principle, and founds it upon *Fletcher* v. *Peck*. The other authorities cited in behalf of the relator are to the same effect. The case of the *United States* v. *Schurz* (102 U. S. R., 379) is cited. We apprehend the court will see at a glance its dissimilarity to this case. In that case a patent had been issued. It had been signed, sealed, perfected, and recorded. The Supreme Court holds that the power of the Land Department over the title to public land ceases when the last official act necessary to transfer the title to the claimant has been performed; that

this state of things exists when the patent has been regularly signed, sealed, countersigned, and duly recorded; that title by patent from the United States is by record; that an acceptance of the grant will, in such case, be presumed from his efforts to secure the favorable action of the Department, and especially from his demand for the possession of the patent.

The Supreme Court (Chief-Justice Waite and Mr. Justice Swayne dissenting) instructed the supreme court of the District of Columbia to issue the writ of mandamus directing the Secretary of the Interior to deliver to the relator the patent.

Now, what are the facts in the case at bar? An act was passed March 2, 1867, directing the issuance of scrip or certificates of new location of public lands; on March 30, 1867, a joint resolution was passed suspending the execution of the former act until further order of Congress; no certificates were issued, and by the terms of the joint resolution, if Congress had the legislative power to pass it, the act of March 2 is suspended, Congress having made no further order.

Counsel for relator say that on the 6th day of March, 1867, her attorney filed a copy of the act with the Commissioner and requested the issuance of the certificates.

Upon this state of facts, it is claimed, a contract exists under which vested rights accrued.

An effort has been made to show that the terms of the act were accepted before its suspension. And how is it shown? In the Schurz case it is stated, in substance, that when a patentee does not dissent, his acceptance and assent are to be presumed from the beneficial nature of

the grant, and that McBride's long pursuit of his claim, and repeated demands in the Department, were proof of his acceptance.

Upon this suggestion, no doubt, counsel have embraced in their argument a statement of what was done before a receiver and register, and also by a committee of Congress, to show an acceptance of the provisions of the act, all of which took place before its passage. If the contract is, as stated, based upon the acceptance of the act subsequent to its passage, and before its suspension, all this is irrelevant.

It is likewise argued that Louis Janin requested the issuance of these certificates before the suspension of the act. This is also urged as proof of the acceptance. But no such request was made in writing. It may be remarked that the subsequent demands are not so informal. We are also informed for the first time that the form of such certificates was actually prepared.

We think it can be said, and safely, that under the provisions of the act, under the general rules of law, under the decisions, and upon the facts as they appear, there was no grant or contract under which the scrip could have been accepted, or under which vested rights accrued.

VII.

Many authorities are quoted from upon the theory that the relator had acquired property in the scrip, which never was issued, and that the same could not be abridged or taken away without due process of law. The cases cited are familiar ones, and if it shall appear to the court that

the relator has been deprived of her property without due process of law no doubt they would properly apply. But, as we have repeatedly stated in this brief, the execution of the act of March 2, 1867, was not begun, and consequently the point in the transaction at which vested rights might have attached was never reached. If no property in the proposed scrip, or interest therein, was acquired, there was no right to be abridged or taken away without due process of law. And this is the contention of the respondent.

In this connection we desire to call the court's attention to *McGee* v. *Mathis* (4 Wall., 156), cited by counsel for relator. In that case the scrip had been issued and was in the hands of the person entitled to receive it, and for this reason alone it was held to represent land. It is not intended to controvert the law in that case. But in this case it is different. The scrip has not been issued, and can not, therefore, represent anything.

The only case cited in the brief for the relator, in which a writ of mandamus was granted against a public officer directing him to deliver to a relator a chattel, is the familiar one of *United States* v. *Shurz* (*supra*). In that instance the patent had been perfected and recorded, and the Secretary of the Interior, upon repeated demands, had refused to deliver it up. It was not a demand for the issuance of the patent, but for the completed paper itself. Here the demand, if any was legally made, was for the issuance of the scrip, and not for the perfected and completed scrip itself. The title to the land in controversy in the Shurz Case had passed to McBride by virtue of the perfected and recorded patent, and for no other reason.

And if the patent had not been so perfected, but had remained *in fieri*, the title to the land would not have passed, and there would have been no vested rights acquired in the land.

Here it is absolutely different. The demand, if any, was for the issuance of the scrip, and not for the scrip itself after it had been issued, signed, sealed, countersigned, aud recorded. In fact, the petition admits the scrip had not been issued.

It may be remarked, therefore, that upon the ruling of the Supreme Court in the cases most favorable to the relator no vested rights were acquired in the scrip, and hence there were no property rights secured therein that could have been abridged or taken away without due process of law.

VIII.

It is contended that the joint resolution by which the act of March 2, 1867, was suspended or repealed is unconstitutional and void. Two reasons are assigned for this, namely, (1) because it impaired the obligation of a contract, and (2), because it took away property without due process of law. These are secondary questions, and they have been thoroughly argued elsewhere. Indeed, the point that there was no contract has been made a controlling issue in the argument for the respondent. We do not deem it necessary or important to repeat it here.

It is sufficient for us to say that we think it has been conclusively shown that no contract ever existed. If this is so, there was no impairment. The authorities cited by

counsel upon this proposition will not, for this reason, be reviewed.

But it is urged that the joint resolution is unconstitutional and void, because it took away property without due process of law. This proposition is founded upon the theory that the relator acquired vested rights, as upon a contract under the act of March 2, 1867, and has also been pretty thoroughly discussed.

We take it that the joint resolution, or order, whichever it may be called, was authorized by section 7, Article I, of the Constitution, and is entitled to the same force and effect that may be given to any other law passed by Congress.

If this is true it can not be construed to have any other effect than that expressed by Congress. The intention of Congress is plain and can not be misunderstood. If no further order shall be made the resolution or order of Congress works a repeal of the act of March 2, 1867. In this condition of the enactments of Congress it was impossible for vested rights to accrue to the relator. The respondent is sustained in this view of the law by the following decisions:

In the mandamus proceeding of *Williams* v. *County Commissioners* (35 Maine Reports, p. 345), the court held:

> The repeal of an act which authorized a course of proceedings by a public officer invalidates the proceedings, if unfinished, at whatever stage they had arrived.

It is further held by the court that all the rights acquired under such circumstances are inchoate and not vested (*Ib.*, 349).

To the same purport is the decision in *Butler* v. *Palmer* (1 Hill, 325), although, if possible, the principle is more strongly expressed.

In *Hampton* v. *Commonwealth* (19 Penn. State (Harris), 329), an act was passed and repealed, and the court held that the repeal of the act before the street was opened put an end to the opening of the street and rendered the proceedings under it *void*, and that the parties in whose favor damages had been assessed could not recover them; that the transaction was not to be considered a contract, but if it were *a contract* the consideration failed by the repeal of the act.

The above authorities are referred to as the law in Sedgwick on Cons. of Stat. and Const. Law, Pomeroy's Notes, 2d edition, p. 112.

IX.

It was substantially held by the court below that the powers and the duties of the Commissioner of the General Land Office are conferred by Congress, and therefore within its control. The duty of issuing the certificates was prescribed by the act of March 2, 1867, but was taken away or suspended by the joint resolution of March 30, 1867. The Commissioner was not only without authority to issue such certificates of location, but was absolutely prohibited, and is still prohibited, from making any such issue. If the writ of mandamus should issue it would be for the purpose of compelling the respondent to perform a duty not required, but prohibited, by law.

The opinion of the supreme court of the District of Columbia is made an appendix to this brief.

Respectfully submitted.

A. H. GARLAND,
Attorney-General.
HEBER J. MAY,
Assistant Attorney.

JANUARY 18, 1889.

APPENDIX.

JAMES, *J.*, delivered the opinion of the court.

When this case was submitted on briefs, and an early decision was asked, we were frankly advised that our conclusions either way would be only a preliminary to review. We have not on that account, however, omitted any degree of care in considering it, and we now refuse the writ because we are of opinion that the relator is not entitled to it. We do, however, for one purpose, take account of that suggestion of counsel; we confine ourselves to a simple statement, without argument, of the grounds of our decision.

In the note to her demurrer to the return the relator states, as matter to be argued, that her right to the certificates, which the act of 2d March, 1867, directed the commissioner to issue, was a vested right, that such right could not be taken away by the joint resolution, and that the latter was void for unconstitutionality. In his printed argument her counsel states his position thus:

> It [the act referred to] is *a grant* to the widow and children of John E. Bouligny of the one-sixth part of the private land claim, in Louisiana, of d'Autrive, amounting to 75.840 acres. The language is, that there be, and *hereby is, confirmed* to Mary Elizabeth Bouligny. But the lands had been already disposed of by the United States to other persons, and therefore it was necessary to give their equivalent, which

> was done *by granting an equal amount of public lands* of the United States subject to private entry, at not exceeding $1.25 per acre, and providing and directing that the Commissioner of the General Land Office should issue new certificates of 80 acres each, which might be located at any land office in the United States.

Again, he states, as a proposition to be argued, that the act gave the widow and children a vested right to 75.840 acres of scrip.

We hold that this act was not a *grant*, and that nothing passed by it. And first as to the Louisiana lands, a point which seems to be a make-weight. The phrase "hereby confirmed" was used astutely, but was misused. The process of confirmation does not take place where the *res* never was possessed, and is not to be possessed, by the confirmee. This so-called confirmation was merely a recital; as if the act had said:

> Whereas Mrs. Bouligny was formerly entitled to certain lands, etc., now, therefore, certificates for other lands shall be issued to her, etc.

After the lapse of twenty-one years, without further action in this matter, so far as appears by this record, it may be our duty to conclude that Congress ascertained that this recital was untrue, and might well withhold the compensation which it had intended to make for a wrong which never existed. Nor was the provision for certificates in lieu *a grant*. Nothing passed by it. Everything remained to be executed. If it was a contract it was wholly executory.

It is claimed, however, that the *right to have* these certificates was *property;* that it was protected, therefore, by the constitutional provision relating to the taking of private property, and that a legislative taking is not due process of law. If the certificates had been ready for

delivery to the relator when the joint resolution interposed, there would have been force in the proposition that they were her property already, and that the joint resolution, having the effect to withhold delivery, constituted an unlawful taking and was void. We do not decide that question. The certificates, however, never had existence, and the relator's right could only be, at best, a right to have them prepared; in other words to have the contract executed. This was nothing more than what, as between private parties, would be called a right of action. Now, it may be that in a certain sense a right of action is property, but a law forbidding the enforcement of a right of action, if objectionable at all, is objectionable because it impairs the obligation of a contract, and not because it is a taking of property.

It is next claimed, therefore, that the joint resolution was a law impairing the obligation of a contract, and that Congress had no power to pass such a law, for the reason that it was not granted by the Constitution. It may be conceded that Congress could not, for that reason, impair the obligation of private contracts, except by the operation of a bankruptcy law, and that an act pretending to do so must be held void; but that does not touch the matter before us. This alleged contract is the contract obligation of the United States, and it can not be enforced, either executively or judicially, until the sovereign grants permission for its enforcement nor after the sovereign withdraws such permission. The power to execute and the right to insist upon its execution exist only while that permission exists. In contemplation of law it has no other obligation.

It may very well be that, when the United States seeks to enforce its contract against a private person, its own obligation will be held by the courts to be unalterable and unimpairable by its own act. It can recover only as it contracted, but when the proceeding is reversed, and a

private person becomes actor and pursues a right which can be accomplished only by enforcing an obligation of the United States, the question is whether a contract of the United States is, in that aspect, an enforceable obligation; and we hold that, except by the consent of the sovereign, no means of enforcement, either executive or judicial, exist. We have already decided that the relief sought by the relator lies in the further execution of the undertaking of the United States; in other words, in the specific performance of the sovereign's contract by one of its officers; we now hold that this can not be enforced at all when the sovereign has withdrawn consent.

And this leads us to a remark concerning the functions of the writ of mandamus. It can not be employed for specific performance of contract, and we hold that the object here sought is of that nature. Again, although it is a proceeding against an individual in his individual capacity, its function is to compel the performance of an act which belongs to his office. In accordance with the views already stated, we hold that the issuing of these certificates has been effectively taken away from the respondent's office. He has no such official duty or capacity. The writ is refused.

Office Supreme Court U. S.
FILED,
JAN 23 1889
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

THE UNITED STATES, *Ex-relatione* MARY ELIZABETH LEVEY, INTERMARRIED WITH GEORGE COLLINS LEVEY

vs.

STROTHER M. STOCKSLAGER, *Commissioner of the General Land Office.*

No. 1481.

ARGUMENT FOR THE RELATOR.

WALTER H. SMITH,
A. T. BRITTON,
A. B. BROWNE,
S. W. JOHNSTON,
Atty's for Relator.

R. O. Polkinhorn, Printer.

Supreme Court of the United States.

OCTOBER TERM, 1888.

THE UNITED STATES, *Ex Relatione*, MARY ELIZABETH LEVEY, intermarried with GEORGE COLLINS LEVEY,

vs.

STROTHER M. STOCKSLAGER, *Commissioner of the General Land Office.*

No. 1,481.

Brief on Behalf of Petitioner.

This cause comes on for hearing upon demurrer by the relator to the answer and return of the respondent to the petition of the relator for a *mandamus*.

The question will be best understood by giving the pleadings *in extenso*.

The petition is in these words:

THE UNITED STATES OF AMERICA.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

THIS 2d DAY OF OCT., A. D. 1888.

THE UNITED STATES, *Ex Relatione* MARY ELIZABETH LEVEY, intermarried with GEORGE COLLINS LEVEY, *vs.* STROTHER M. STOCKSLAGER, *Commissioner of the General Land Office.*	At Law, No. 28,978.

Petition.

To the Supreme Court of the District of Columbia:

Your petitioner, the said Mary Elizabeth Levey, respectfully represents, that she is the identical person who was formerly Mary Elizabeth Bouligny, the widow of John E. Bouligny, deceased, and who is named in the Act of Congress passed on the 2d day of March, 1867, and more particularly hereinafter set forth, and that she has, since the passage of said act, intermarried with George Collins Levey, and was, on the 29th day of March, 1888, and now is his wife.

Your petitioner further represents that in pursuance of the request and claim of the parties thereto, Congress, on the 2d of March, 1867, passed the following act, to wit:

"*An act for the relief of the heirs of Jo E. Bouligny.*"

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there be and hereby is confirmed to Mary Elizabeth Bouligny, Corrinne Bouligny and Felice Bouligny, the widow and children of John E. Bouligny, deceased, the one-sixth part

of the land claim of Jean Antoine Bernard d'Autrive, in the State of Louisiana, said one-sixth part amounting to seventy-five thousand eight hundred and forty acres; and that, inasmuch as the said land embraced in said claim *have* (has) been already appropriated by the United States to other purposes, certificates of new location in eighty acre lots, be issued to the said Mary Elizabeth Bouligny for her own benefit and that of her said minor children, in lieu of said lands, to be located at any land office in the United States, upon any public land subject to private entry at a price not exceeding one dollar and twenty-five cents per acre.

"The Commissioner of the General Land Office is hereby directed to issue said certificates of new location, in accordance with existing regulations in such cases." (14 Stat., 635.)

Your petitioner further represents that, on the 6th day of March, 1867, her attorney filed with the Commissioner of the General Land Office a certified copy of said act of March 2, 1867, and requested the issuance of the certificates of new location named in said act.

Your petitioner further represents that, the said act of March 2, 1867, was passed by the 39th Congress, which said Congress adjourned on the 3d of March, 1867, and that, at the next session of Congress, being the 40th Congress, the said 40th Congress on the 30th of March, 1867, passed the following joint resolution, to wit:

"*Joint Resolution directing the Secretary of the Interior to suspend the execution of a law passed by the Thirty-ninth Congress for the relief of the heirs of John E. Bouligny.*

"*Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled.*"

"That the Secretary of the Interior be directed to suspend the execution of the act entitled 'An act

for the relief of the heirs of John E. Bouligny, approved March second, eighteen hundred and sixty-seven, until the further order of Congress." 18 Stat., 353.

Your petitioner further represents that Congress has made no "further order" in said matter.

Your petitioner further represents that the defendant herein, Strother M. Stockslager, was on the 29th day of March, 1888, and since has been and now is Commissioner of the General Land Office of the United States, and that she, on the 29th day of March, 1888, demanded of him as such Commissioner that he issue to her, for her own benefit and that of her said minor children Corrine Bouligny and Felice Bouligny, certificates of new location for seventy-~~four~~ thousand eight hundred and forty acres, in eighty acre lots, locatable at any land office in the United States, upon any public lands subject to private entry, at a price not exceeding one dollar and twenty-five cents per acre, in conformity with the provisions of the said act of March 2, 1867.

Said demand was made in writing, at the office of the said Commissioner of the General Land Office, in the City of Washington and District of Columbia.

The said Commissioner on the 12th day of April, 1888, refused to grant said request, or any part thereof.

Your petitioner further represents that, on the 13th day of April, 1888, she duly appealed from the said decision and refusal of the Commissioner of the General Land Office to the Hon. Secretary of the Interior, and that the said Secretary, on the 3d day of May, 1888, approved the decision of the Commissioner.

Your petitioner further represents that no portion of the certificates of new location, mentioned in the said act of Congress has ever been issued, and that by the refusal of said Commissioner and by the affirmance of his said decision by the Secretary she is deprived of the power to obtain said certificates

or any partt hereof, and that she is injured thereby, and that she is entirely without remedy in the premises unless it be now afforded by the interposition of this Honorable Court.

Your petitioner further represents that she has heretofore repeatedly made application to the Commissioners of the General Land Office for the issuance of said certificates of new location, and has always met with a refusal on their respective parts to issue the same.

Your petitioner therefore prays that a writ of mandamus may issue against the said Strother M. Stockslager, Commissioner of the General Land Office, and that he may be commanded and directed by this Court to execute and deliver to your petitioner for her own benefit and that of her said minor children, Corrine Bouligny and Felice Bouligny, certificates of new location for seventy-five thousand eight hundred and forty acres, in eighty acre lots, locatable at any land office in the United States upon any public lands subject to private entry, at a price not exceeding one dollar and twenty-five cents per acre, as required by the said act of Congress; and that such other order may be made in the premises as law and justice may require.

MARY ELIZABETH LEVEY,
formerly Mary Elizabeth Bouligny.

WALTER H. SMITH,
A. T. BRITTON,
A. B. BROWNE,
S. W. JOHNSON,
Atty's for Petitioner.

I, Mary Elizabeth Levey, the above named petitioner, being first duly sworn, say that the several matters and things set forth in the foregoing petition are true.

MARY ELIZABETH LEVEY,
formerly Mary Elizabeth Bouligny.

Subscribed and sworn to before me, Francis W. Fingout, Deputy Consul General of the United States for the Kingdom of Great Britain, duly authorized and commissioned, this 24th day of July, 1888.

In witness whereof I have hereunto set my hand and the official seal of my office this 24th day of July, 1888.

FRANCIS W. FINGOUT,
[SEAL.] *Deputy Consul General, U. S. A.,*
London, England.

Answer of Respondent.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

This 11th day of October, A. D., 1888.

THE UNITED STATES, *ex rel.*, MARY ELIZABETH LEVY, intermarried with George Collins Levy,
vs.
STROTHER M. STOCKSLAGER, Commissioner of the General Land Office.
} No. 28,978.

To the Supreme Court of the District of Columbia, sitting in General Term.

Now comes the respondent, Strother M. Stockslager, Commissioner of the General Land Office, by his counsel in this behalf, and for the cause and reason why the writ of mandamus prayed for herein should not be issued as prayed, respectfully shows unto the Court:

That he has been served with an order or rule from the Honorable Court, requiring him to show cause why a writ of mandamus should not be issued from said court directed to him as Commissioner of the General Land Office, upon the petition of Mary

Elizabeth Levy, intermarried with George Collins Levy, the relator herein, commanding this respondent to execute and deliver to said petitioner and relator for her own benefit, and that of her minor children, Corinne Bouligny, certificates of new location, for seventy-five thousand eight hundred and forty acres, in eighty acre lots, locatable at any land office in the United States upon any public lands subject to private entry at one dollar and twenty-five cents per acre, as required by the act of Congress of 2d of March, 1867, (14 Stat. at L., 635,) which act is fully set out in the petition, and that such other order may be made in the premises as law and justice may require.

The respondent, answering, says that Congress, on the 2d day of March, 1867, passed the act for the relief of the heirs of John E. Bouligny, a copy of which is fully set out in the petition, as aforesaid; but it is averred by the respondent that as he verily believes no action had been taken by the General Land Office for the purpose of carrying out and giving effect to the provisions of said act, nor had any of the certificates of new location, as therein provided, been executed, issued, or delivered up to and including the 30th day of March, 1867, a period of twenty-eight days after the passage of said act; and, on the 30th day of March, 1867, Congress suspended the execution of said act of March 2, 1867, by the passage of a joint resolution, which reads as follows:

Joint Resolution directing the Secretary of the Interior to suspend the execution of a law passed by the Thirty-ninth Congress for the relief of the heirs of John E. Bouligny.

Be it resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be directed to suspend the execution of the act entitled "An act for the relief of the heirs of John E.

Bouligny," approved March second, eighteen hundred and sixty-seven, until the further order of Congress.

Approved March 30, 1867.

That by reason of the passage of the Joint Resolution, as aforesaid, the power of the respondent to execute, issue and deliver to the heirs of said John E. Bouligny the said certificates of new location was suspended until the further order of Congress; that Congress has made no further order, nor has it taken any action looking to the revival of the act of March 2, 1867; nor has the legislative inhibition contained in the said joint resolution against the issuance of the certificates of new location been removed, but the same remains in full force.

The respondent has no knowledge that the relator, or the heirs of John E. Boulingy, on the 6th day of March, 1867, by attorney, requested the issuance of the certificates of new location under the act of March 2, 1867.

The respondent admits that he was on the 29th day of March, 1888, and since has been, and now is Commissioner of the General Land Office of the United States; also, that the relator on the 29th day of March, 1888, as alleged, applied for the issuance of the certificates of new location under the Act of March 2nd, 1867, but he avers that such application was denied by him on the 12th day of April, 1888, for the reason that by the joint resolution of Congress approved March 30, 1867, the Secretary of the Interior was directed to suspend the execution of the Act of March 2, 1867, until the further order of Congress, and, as said act of Congress still remains in suspension by force of the joint resolution aforesaid, no action can, as he verily believes, properly be taken by the respondent; also that an appeal was taken, as alleged, to the Secretary of the Interior by whom the decision of the respondent was affirmed.

The respondent likewise admits that no portion of the certificates of new location have been issued

under the said act of March 2, 1867, so far as he knows and believes.

The said respondent specifically avers as follows:

1. That no certificates of new location as he verily believes were issued by the Commissioner of the General Land Office under the act of March 2, 1867, prior to the passage by Congress of the joint resolution directing the suspension of said act, on March 30, 1867.

2. That since the passage of said joint resolution, to wit: March 30, 1867, he has had no power or jurisdiction, as he believes, under the law to execute, issue and deliver to the relator, or to the heirs of John E. Bouligny, such certificates of new location under the Act of March 2, 1867.

3. That the joint resolution passed March 30, 1867, is the last expression of Congress upon the subject. Congress has made no further order, and the Act of March 2, 1867, remains thereby repealed or suspended.

4. That the Act of March 2, 1867, did not, as he believes, give nor grant to the relator, nor to the heirs of John E. Bouligny, a vested right to the certificates of new location *in præsenti*, and inasmuch as such certificates were never executed, issued and delivered, no right or title therein has been vested in the relator, nor in the heirs of said Bouligny, under such act.

5. The relator, and the heirs of said Bouligny, have, as he believes, no property right in such certificates of new location, under said act, nor otherwise, until the same shall have been executed, issued, and delivered to them or to their legal representatives or agents.

6. The Commissioner of the General Land Office is directed by the Act of March 2, 1867, to issue such certificates of new location in accordance with existing regulations in such cases, which in the event the joint resolution of March 30, 1867, had not suspended

the act aforesaid, would have conferred upon this respondent, as he verily believes, under the law, the performance and exercise of an official duty within his judgment and discretion, which is not reviewable by, nor within the jurisdiction and control of this Honorable Court.

7. The respondent also avers that, as he verily believes, the official duty to be discharged by the Commissioner of the General Land Office, under the Act of March 2, 1867, "in accordance with existing regulations in such cases" is not a ministerial duty.

8. The respondent further avers, that if the relator had acquired a vested right to, or property in, the certificates of new location under the Act of March 2, 1867, (which is not admitted) a remedy was afforded in the Court of Claims under 1059 to recover the value thereof, provided the petition setting forth the claim had been presented to that court within six years after such claim first accrued.

For the reasons set forth, which respondent trusts will be obvious to the court, as well as for such other reasons as to the court may seem proper, the respondent respectfully objects to the jurisdiction assumed in this case.

As to any other matter or material allegation set forth in said petition not particularly responded to in this answer or return, the respondent denies the same, and submits the issue to the Honorable Court.

Wherefore, the respondent respectfully submits that it is not competent for this court to issue its writ of mandamus in this case, and prays that the rule may be discharged and the petition dismissed.

S. M. STOCKSLAGER,
Commissioner of the General Land Office.

HEBER J. MAY,
Attorney for Respondent.

(Jurat.)

Demurrer of Relator.

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA,

THIS 2d DAY OF OCT., A. D. 1888.

THE UNITED STATES, *Ex Relatione*, MARY ELIZABETH LEVEY, intermarried with GEORGE COLLINS LEVEY, *vs.* STROTHER M. STOCKSLAGER, *Commissioner of the General Land Office.*	At Law, No. 28,978.

And now comes the above named relator and says that, the answer and return of said respondent, to the rule to show cause why a mandamus should not be issued against him as prayed for is bad in substance.

WALTER H. SMITH,
A. T. BRITTON,
A. B. BROWNE,
S. W. JOHNSON,
Atty's for Relator.

And this relator further says that, upon the hearing of the aforesaid demurrer, it will be argued by the said relator, as matter of law, that said answer and return does not set up any legal defense to the aforesaid petition of this relator; that the same is insufficient in law; that the remedy suggested by the said answer and return, by proceedings in the Court of Claims, does not exist in law; that the right in said certificates of location, given by said act of Congress, was a vested right, and could not be and was not taken away by the said joint resolution; that said joint resolution was unconstitutional and void; that the following clause in said answer and return, to wit: "As to any other matter, or material allegation set forth in said petition, not particularly responded to in this answer or return, the respondent

denies the same, and submits the issue to the Honorable Court," is not authorized by law in that it is too general and does not specify with particularity the allegations of the petition, or any of them, which are deemed material, but leaves it to the court to ascertain what allegations are thereby denied ; and that the said answer and return by reason of the aforesaid matters is insufficient in law.

WALTER H. SMITH,
A. T. BRITTON,
S. W. JOHNSTON,
A. B. BROWNE,
Atty's for Petitioner.

Argument.

Before we proceed to the argument of the main question in the case, we will consider some matters which arise upon the answer and return of the Commissioner, and in the order they are stated in the answer.

1. The answer states that—

"The respondent has no knowledge that the relator, or the heirs of John E. Bouligny, on the 6th day of March, 1867, by attorney, requested the issuance of the certificates of new location under the act of March 2, 1867."

The petition alleges that—

"Your petitioner further represents that on the 6th day of March, 1867, her attorney filed with the Commissioner of the General Land Office a certified copy of said act of March 2, 1867, and requested the issuance of the certificates of new location named in said act."

It will be observed that the answer does not pretend in any manner to deny the fact and most important clause in said paragraph, to wit, that *she filed with the Commissioner on the 6th of March*, 1867, *a certified copy of the act of March* 2, 1867. This was done twenty-four days before the passage of the joint resolution. It shows that the parties in interest *then accepted the terms of said act*, if they had never done it before.

There is no denial of the last clause of the paragraph, to wit, that the petitioner on the 6th of March, 1867, requested of the Commissioner the issuance of the certificates.

True, the Commissioner says that "he has no knowledge" that it was done, but that is not a denial. No such denial as that was ever recognized by the common law. Something somewhat akin to it is found in the various codes of practice.

Thus in the New York code, which is the foundation of most that have followed, it was provided that the answer might contain a general or special denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief. (Code, § 149.)

But under this provision it was uniformly held that a mere denial of any knowledge was not sufficient, but the party must allege that he had no knowledge or information thereof sufficient to form a belief.

Wait, in his practice, Vol. 2, page 419, says:

"The code thus authorizes either of three forms of denial of the allegations of a complaint. The two

first are direct denials of some or all of the allegations in complaint; *the last is not a denial of any fact alleged*, but is a mere denial of any knowledge or information, as to the alleged facts sufficient to form a belief in respect to their existence or non-existence. The first two forms of denial are direct defenses; *the latter is a mere statutory defense.* That a defendant has no knowledge or information sufficient to form a belief whether the allegations of a complaint are true, is of no consequence as an abstract proposition, and, of itself, *is no defence;* but the statute has permitted the defendant to put any or all of the material allegations of a complaint in issue by this form of pleading, and has declared, that, for the purpose of a pleading, a denial in this form, shall be deemed a sufficient defense to require the plaintiff to prove his case. See *Flood* v. *Reynolds*, 13 How., 112; *Townsend* v. *Platt*, 3 Abb., 325; *Livinsgton* v. *Hammer*, 7 Bosw., 670; *Leach* v. *Boynton*, 3 Abb., 1."

See also *Bentley* v. *Dorcas*, 11 Ohio State, 409.

2. The Commissioner suggests in his answer that the issuance of the certificates of new location, in accordance with "existing regulations," involves judgment and discretion.

The act itself directs the Commissioner to issue the certificates "in accordance with existing regulations in such cases."

That there were "existing regulations" is implied in the act, and is not denied by the Commissioner. The simple duty imposed upon him is the manual preparation and execution of the form in accordance with the regulations then existing, and that is very clearly a ministerial act. It is as much so as would have been the preparation and execution of patents, if the act had directed patents to be issued in accordance with law.

3. The Commissioner suggests that the relator has a remedy in the Court of Claims under Section 1059 of the Revised Statutes.

That section provides that:

"The Court of Claims shall have jurisdiction to hear and determine the following matters: *First.* All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress."

The claims herein referred to are money demands. Such is the universal understanding of the profession.

And according to all the authorities the remedy must be one which will give us the very thing that we are entitled to, and that is the certificates of new location.

Harwood v. *Marshal*, 9 Md., 83.
People v. *Head*, 25 Ills., 325.

That involves equity jurisdiction and the power to decree specific performance. That the Court of Claims has no equity jurisdiction is expressly determined in *Bonner* v. *United States*, 9 Wall., 156. The Court said:

"But the Court of Claims has no equitable jurisdiction given it, and was not created to inquire into rights in equity set up by claimants against the United States. Congress did not think proper to part with the consideration of such questions, but wisely reserved to itself the power to dispose of them."

There is another reason why the Court of Claims would have no jurisdiction in this case.

That Court has no jurisdiction to enforce rights depending upon prior performance, by an executive officer of duties which he has failed to perform. So held in *United States* v. *McLean*, 95 U. S., 750.

That was an action in the Court of Claims by McLean to recover compensation as deputy postmaster under the act of July 1, 1864, which required the Postmaster General to readjust certain salaries.

The Court said :

"From a review of these statutory provisions it appears plainly that, after a salary of a Postmaster has been fixed, a readjustment by the Postmaster General must be made before it can be increased, and the readjustment takes effect, in all cases, prospectively. The law imposes no obligation upon the Government to pay an increased salary, unless a readjustment has preceded it. And by the act of 1866 the Postmaster General is not to readjust an existing salary, unless the quarterly returns show cause for it. Now, if it be conceded that the quarterly returns made on the last day of each quarter, beginning with June 30, 1871, made it the duty of the Postmaster General to make a readjustment immediately on the receipt of the returns, still his readjustment was an executive act, made necessary by law, in order to perfect any liability of the Government. If the executive officer failed to do his duty, he might have been constrained by a *mandamus*. But Courts cannot perform executive duties, or treat them as performed when they have been neglected. They cannot enforce rights which are dependent for their existence upon a prior performance by an executive office of certain duties he has failed to perform."

4. The paragraph in the answer that "as to any other matter, or material allegation, set forth in said petition, not particularly responded to in this answer or return, the respondent denies the same, and submits the issue to the Honorable Court," is bad pleading.

The rule is that, in mandamus, the respondent must make *direct* answers to all material allegations in the petition, and some of the cases go so far as to hold that the highest degree of strictness and particularity should be required, so that the pleading will stand the test of being certain to every intent, and the party, if he swears falsely, may be convicted of perjury.

10 Md., 464.

The more modern practice does not require so great strictness.

Commonwealth vs. *Com'rs*, 37 Penn. State, 237.

In this case the court said (page 245):

"It is apparent that this is not a flat and distinct traverse of the relator's title as he has set that title forth. It is never to be forgotten that the respondents are bound to return plain and *direct* answers to the allegations of the writ, and in this light every part of the return is to be judged."

And in *Harwood* vs. *Marshal*, 10 Md., 464, the court said:

"If the return deny the supposal of the writ, the traverse must be *single, direct, and certain.* The rule being that every distinct and material allegation contained in the writ, must, if it be intended to contradict them, be traversed."

The traverse in the paragraph of the answer, now under consideration, is not single or direct or certain. It amounts to this, if there be any other allegation in the petition of the relator that is material, I deny the same, and the court is driven to the necessity of inaugurating a search for any such allegation. The court will not do that. This paragraph, therefore, is bad in form and substance, and if bad for either cause, is subject to demurrer under the rules of this Court below.

The rule upon demurrer is as follows:

"31. The form of a demurrer shall be as follows:

"The defendant says that the declaration (indictment or other pleading, as the case may be) is bad in substance.

"And in the margin thereof some substantial matter of law, intended to be argued, shall be stated, and a demurrer without such statement, or with a frivolous statement, may be set aside by a justice at chambers or by the court, and leave given to enter judgment as for want of plea; provided that no final judgment shall be entered in a criminal case against any defendant upon overruling his demurrer to any indictment; but the judgment in every such case shall be that he answer over, unless he elect to stand on his demurrer."

With these remarks upon the answer, we now come to the real, highly interesting and important question in the case, and that is *what construction should be given to the act of Congress and the joint resolution, and what is their effect upon the rights of the relator?*

The first inquiry that naturally arises is, what is meant by the term "the further order of Congress?"

Does it mean the further order of the particular Congress; or the further order of Congress that shall be made within a reasonable time; or is it indefinite and means the order of any future Congress, no matter how remote? If the latter, then it amounts to a repeal of the act; it requires each House of Congress to act and virtually re-enact the act. We shall show hereafter that a repeal would be unconstitutional and void. Therefore some other construction should be sought for which will not make Congress attempt to do an unauthorized act.

Such a construction will be found in the practice of the various departments. They have often been called upon by Congress to delay action and have always done so during the existence of that Congress. If that Congress adjourned without action, they have proceeded in the matter referred to.

And such was doubtless the intention of Congress in passing the Joint Resolution. The act itself had been passed but two days before the adjournment. It was thought to have been passed without due deliberation. Time was asked to look further into the subject to see if action had been inconsiderate. The members of *that particular Congress* desired such time. The whole term of that Congress would be ample time; that would be two years. But if that is considered too short a time, then they intended to give a reasonable time. What is a reasonable time? That has always been held to depend upon the circumstances of each case.

Parsons says:

"There is, perhaps, no exact definition, and no precise standard of reasonable time. The true rule

must be that that is a reasonable time which preserves to each party the rights and advantages he possesses, and protects each party from losses that he ought not to suffer." (2 Parson's Cont., 661.)

No case can be found where a reasonable time was held to give ten years, much less nineteen and nearly twenty. In the very latest case on the subject of what is a reasonable time the Supreme Court held, that a delay of six months on the part of a board of directors in disaffirming a contract made by their president, which he had no authority to make, was an unreasonable time. *Indianapolis Rolling Mill* v. *St. Louis, Fort Scott and Wichita R. R.*, 120 U. S., 256. So that a reasonable time has already long since expired and the Joint Resolution is satisfied, and does not stand in the way of issuing the scrip.

If this view is adopted it will end the matter; but if your Honors shall be unwilling to accept it, then it will be necessary to further consider the act.

The construction of the act is free from doubt. It is a legislative confirmation and grant, and such a grant is declared by the Supreme Cout in *Whitney* vs. *Morrow*, 112 U. S., 693, to be the highest muniment of title, and superior to that by patent.

It is a grant to the widow and children of John E. Bouligny, of the one-sixth part of the private land claim in Louisiana of d' Autrive, amounting to 75,-840 acres. The language is, "That there be, *and hereby is, confirmed* to Mary Elizabeth Bouligny." But the lands had been already disposed of *by the United States* to other persons, and therefore it was necessary to give their equivalent, which was done by granting an equal amount of public lands of the

United States subject to private entry at not exceeding one dollar and a quarter per acre, and providing and directing that the Commissioner of the General Land Office should issue new certificates of eighty acres each, which might be located at any land office in the United States.

Congress had undoubted power to make this grant. It was the absolute owner of all the public lands, and it had the right and the power to dispose of them, as in its sovereign pleasure, it saw fit. It might sell or give them away, and no tribunal could question its action.

Tameling vs. *U. S. Freehold Co.*, 93 U. S. 663;
Maxwell Land Grant Case, 121 U. S., 325.

In the latter case a patent had issued for 1,714,764 acres of land. Suit was brought by the United States to set it aside. It was claimed that the patent had issued upon a grant originally made to Beaubien and Miranda, two individuals, and that by the laws of Mexico, no more than eleven square leagues could be granted to a single person.

But Congress had confirmed the claim as recommended by the Surveyor General of New Mexico, and the court held that Congress had power to confirm the grant according to the report of the Surveyor General, and that it had done so, and that the court could not go behind the act.

Mr. Justice MILLER, in delivering the opinion of the court, said:

"And when the Congress of the United States, after a full investigation, and elaborate reports by its committees, confirmed these grants as recom-

mended by the Surveyor General of the territory, we must suppose that it was intended to be a full and complete confirmation as regards the legal validity, fairness and honesty of the grant, as well as its extent." (p. 369.)

"Certainly the power of the courts can go no further than to make a construction of what Congress intended to do by the act we have already considered, confirming this grant and others." (p. 382.)

U. S. v. Fossat 113 U. S. 418.

The reason or motives which induced its action are not open to inquiry. Not even though it was procured by corruption and bribery.

Fletcher vs. *Peck*, 6 Cranch., 87.

The act gave the widow and children a vested right to 75,840 *acres of scrip. That right was property, and could not be abridged or taken away without "due process of law."*

The joint resolution was not due process of law. It was an abridgment and practical destruction of that right, and therefore unconstitutional and void, and should be disregarded by the Executive Department.

It will be our object to maintain these several propositions as above stated.

I.

The act gave the widow and minor children a vested right in the scrip.

It was settled by the Supreme Court of the United States at a very early day, that a grant like the one now under consideration, was a *contract*, and as such conferred rights which could not afterwards be divested by the law making power. *Fletcher* vs. *Peck*,

supra. In this case the legislature of Georgia passed an act authorizing the governor of the State to sell to Gunn and others, a large tract of land. He made the sale. A subsequent legislature repealed the act, and declared that it had been procured, to be passed, by bribery of the members of the legislature, and was void. Chief Justice MARSHALL delivered the opinion of the court.

He said:

"The Constitution of the United States declares that no State shall pass any bill of attainder, or *ex post facto law*, or law impairing the obligation of contracts. Does this case, now under consideration, come within this prohibitory section of the Constitution? In considering this very interesting question we immediately ask ourselves, what is a contract? Is a grant a contract?

"A contract is a compact between two or more parties. and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of the contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant. Since then, in fact, a grant is a contract executed, the obligation of which still continues; and since the Constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must

be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract, to convey was secured by the Constitution, while an absolute conveyance remained unprotected."

"If, under a fair construction of the Constitution grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be construed as inhibiting the State from impairing the obligation of contracts between two individuals but as excluding from that inhibition contracts made with itself? The words themselves contain no such distinction. They are general and are applicable to contracts of every discription."

In *Dartmouth College* vs. *Woodward*, 4 Wheat., 518, the Court held that a charter granted by the King of Great Britain was a contract as soon as its provisions were accepted, and that it was protected by the Constitution of the United States.

Mr. Justice WASHINGTON said:

"If a doubt could exist that a grant is a contract, the point was decided in *Fletcher* vs. *Peck*, 6 Cranch, 87, in which it was laid down that a contract is either executory or executed; by the former a party binds himself to do or not to do a particular thing; the latter is one in which the object of the contract is performed, and this differs in nothing from a grant; but whether executed or executory they both contain obligations binding on the parties, and both are equally within the provisions of the Constitution of the United States, which forbids the State govern-

ments to pass laws impairing the obligation of contracts."

And Mr. Justice STORY, in speaking of the case of *Fletcher* vs. *Peck*, said:

"This language is perfectly unambiguous, and was used in reference to a grant of land by the governor of a State under a legislative act. It determines, in the most unequivocal manner, that the grant of a State is a contract within the clause of the Constitution now in question, and that it implies a contract not to resume the rights granted."

"*A fortiori*, the doctrine applies to a charter or grant from the King. * * * Now, when a contract has once passed, *bona fide*, into grant, neither the King nor any private person, who may be the grantor, can recall the grant of the property, *although the conveyance may have been purely voluntary.*

"Was it ever imagined that land, *voluntarily* granted to any person by a State, was liable to be resumed at its own good pleasure? Such a pretension would, under any circumstances, be truly alarming; but in a country like ours, where thousands of land titles had their origin in gratuitous grants of the States, it would go far to shake the foundations of the best settled estates. And a grant of franchises is not, in point of principle, distinguishable from a grant of any other property. If, therefore, this charter were a pure donation, when the grant was complete and accepted by the grantees, it involved a contract that the grantees should hold and the grantor should not reassume the grant, as much as if it had been founded on the most valuable consideration."

If this is so, when the grant is purely voluntary, how much more is it true when the grant is made in satisfaction of an alleged claim to the thing granted, as in the case at bar.

In *McGee* vs. *Mattus*, 4 Wall., 143, it was held that the grant of swamp lands by the United States to the States, was a contract and protected by the Constitution.

Cooley on Const. Limitation, page 332, in speaking of the contracts protected by the Constitution, refers to grants, and the case of *Fletcher* vs. *Peck*, 9 Cranch, 87, and says :

"It will be seen that this leading case *settles* two important points : First, that an executed contract is within the provision, and, second, that it protects from violence the contracts of States equally with those entered into between private individuals."

And Parsons, in referring to the contracts protected by the Constitution, says that—

"It seems to be *conclusively settled*, that a grant is a contract : executed, it is true, but still a contract, and that it comes within the scope of this provision, and therefore if there be a grant, in itself valid, any law which is, or permits a direct interference with the enjoyment of the things granted, or a diminution of their value, or any deprivation of the things granted or of the rights or interests belonging to them, by the grantor, impairs the obligation of the contract."

3 Parsons Cont., 527.

There can be no doubt about the act in question being a contract as soon as its provisions were accepted by the Bouligny heirs. It contains all the elements of a contract. It is founded upon a good consideration, and is between parties able to contract with each other.

It differs in no respect from a contract between two individuals.

The act of Congress, so far as it related to the claim that was confirmed, was an executed contract, and so far as it related to the issuing of the scrip, it was an executory one. The executed portion gave a vested right to 75,840 acres of the confirmed claim, and the executory portion gave a vested right, by contract, to have the 75,840 acres of scrip issued as therein provided. The faith of the Government was pledged that this should be done, and that, too, upon a good consideration. The consideration was the giving up, by the widow and heirs, of what the law found they were entitled to, that is, the land itself, and accepting, in lieu thereof, the scrip.

The act in question is a private act for the relief of the heirs of John E. Bouligny. Such acts are always passed at the instigation of the parties to be benefited thereby, and they are presumed to accept the terms of the act.

This doctrine is referred to in *United States* vs. *Schurz*, 102 U. S., 399. Mr. Justice MILLER said:

"It is also said that there was no acceptance of the patent by the grantee, and for that reason it is ineffectual to convey title. It is not necessary to enter into much discussion on this subject, because the acceptance of a deed may be presumed under circumstances far short of what was admitted to exist in this case. The doctrine on this point is well stated by Attorney General Crittenden, in the case of Pierre Matelle, in 1841, as found in 3, Op. Att. Genl., 654, which was a case like the present, in regard to the duty of the Secretary to deliver the patent then lying in the office.

"My opinion," said he, "is that the title to the land did pass to Pierre Matelle at the date of the patent to him, though that patent still remains in the land office without any actual tradition of it to

any one. The patent was issued by authority and direction of law ; and, upon general principles, when the patentee does not expressly dissent, his assent and acceptance are to be presumed from the beneficial nature of the grant. But it is hardly necessary to resort to such presumptions, because, in this and in all such cases, the acts required to be done by the claimant, and actually done by him in the preparation of his claim for patenting, are equivalent to a positive demand of the patent, and amount to an acceptance of it."

"The patent, in the meaning of the act referred to, is granted to the patentee from its date, though he may never actually see or receive it, and is valid and effectual to pass title to the land." * * * *

"The long pursuit of this claim by McBride, his repeated demand for the patent after it had been perfected, and his persistent effort to obtain possession of it, are ample proof of his acceptance of the grant, of which it is the evidence."

But in the present case we need not resort to presumption.

The petition alleges that the act was passed at the request of the parties in interest, and that allegation is not denied by the answer. If it had been the public records of Congress would have shown that such was the case. We here refer to them, not as evidence, but as part of our argument.

The parties made their claim before the register and receiver under the act of Congress of February 6, 1835. (4 Stat., 749.)

The register and receiver reported favorably November 22, 1837, upon their claim, and in their report, which was communicated to Congress February 14, 1838, said :

"The heirs of Bernard D'Autrive claim the confirmation of their title to a tract of land in the parish of Iberville, on the west bank of the Mississippi, having forty-four arpens front and running back to the Atchalafaya, *with the exception of so much thereof as has been confirmed to other persons, or has been sold by the United States, for which they intend to claim compensation from the United States.*"

The report on this claim was never acted upon by Congress.

At the 1st session of the 36th Congress the Committee on Private Land Claims made their report (No. 343) upon the claim of the heirs. In that report they copied the extract above given from the register and receiver, and said:

"The memorialists now petition Congress for a final decision upon this report, and declare that they now confine their claim to so much of their original French grant as was confirmed by the Spanish Government, and that, *for such of the land embraced in the claim to which other parties have acquired titles from the United States, they may receive certificates of relocation to be located upon any public lands of the United States subject to private entry.*"

This report was made April 6, 1860, and is found on page 1304 of Reports of Committee on Private Land Claims, published 1879.

More than this, on the 6th of March, 1867, which was four days after the passage of the act, and twenty-four days before the passage of the Joint Resolution, Louis Janin, who had been and was the attorney of the widow and children, filed with the Commissioner of the General Land Office a certified copy of the act of March 2, 1867, and re-

The Court said :

"It was never doubted by this court that property of every description in Louisiana was protected by the law of nations, the terms of the treaty and the acts of Congress, nor that in the term *property*, was comprehended every species of title, inchoate or perfect, embracing those rights which lie in contracts; those which are executory, as well as those which are executed."

See also *Bryan* vs. *Kennett*, 113 U. S., 192, where the same principle is stated with great amplification.

Having fairly shown, as we think, that the interest of the widow and heirs under the act was property, we now come to the balance of our proposition that it could not be abridged or taken away without "due process of law,"

This is settled by the express provision of the Constitution. The fifth amendment expressly provides that no person shall "be deprived of life, liberty or *property* without due process of law."

What, then, is "due process of law?" Is an act of Congress such due process of law? The question finds a ready answer in the concurrent decisions of our highest legal tribunals.

In *Murray's Lessee* vs. *Hoboken Land Co.*, 18 How., 276, Mr. Justice CURTIS, in delivering the opinion of the Court, said :

"The words 'due process of law' were undoubtedly intended to convey the same meaning as the words 'by the law of the land' in *Magna Charta*. Lord Coke, in his commentary on those words (2 Inst., 50), says they mean due process of law. The Constitutions which had been adopted by the several States before the formation of the Federal Constitu-

tion, following the language of the great charter more closely, generally contained the words 'but by the judgment of his peers, or the law of the land.' The ordinance of Congress of July 13, 1787, for the government of the territory of the United States, northwest of the River Ohio, used the same words."

In *Walker* vs. *Sauvinet*, 92 U. S., 92, Mr. Chief Justice WAITE said:

"A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State Courts, affecting the property of persons, must be by jury. This requirement of the Constitution is not violated if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee* vs. *Hoboken Land Co.*, 18 How., 280. Due process of law is process due according to the law of the land."

In *Kennard* vs. *Louisiana*, 92 U. S., 481, the same Chief Justice said:

"The sole question presented for our consideration in this case, as stated by the counsel for plaintiff in error, is, whether the State of Louisiana, acting under the statute of Jan. 15, 1873, through the judiciary, has deprived Kennard of his office without due process of law. It is substantially admitted by counsel in the argument that such is not the case if it has been done in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights.' We accept this as a sufficient definition of the term 'due process of law' for the purposes of the present case."

In *Davidson* vs. *New Orleans*, 96 U. S., 105, Mr. Justice MILLER said:

"It is not possible to hold that a party has, with-

out due process of law, been deprived of his property when, as regards the issues affecting it, he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice in *Kennard* vs. *Morgan* (92 U. S., 480) and, in substance, repeated at the present term in *McMillan* vs. *Anderson* (95 Id., 37)."

In *Hurtado* vs. *California*, 110 U. S., 535, Mr. Justice MATTHEWS said:

"Due process of law in the latter" (Fifth Amendment) "refers to that law of the land which derives its authority from the legislative powers conferred upon Congress by the Constitution of the United States, exercised within the limits therein and interpreted according to the principles of the common law. * * * * Law is something more than mere will exerted as an act of power. It must not be a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so that every citizen shall hold his life, liberty and property, and immunities under the protection of the general rules which govern society, and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar, special, partial and arbitrary exertions of power under the forms of legislation."

In *Hager* vs. *Reclamation*, District 111, U. S. 708, Mr. Justice FIELD, in delivering the opinion of the Court, said:

"It is sufficient to observe here, that by 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and, wherever it is necesary to the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought. The clause in question means, therefore, that there can be no proceeding against life, liberty or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights. *Hurtado* vs. *California*, 110 U. S., 516, 536. * * * * * Undoubtedly, where life and liberty are involved due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved."

These decisions settle the law, and affirm and establish the construction given to the phrase "due process of law" by the State courts. These courts hold that "due process of law" implies and includes an *actor*, *reus*, *judex*, regular allegations, opportunity to answer and defend, and a trial or hearing according to some settled course of judicial proceedings.

Hoke vs. *Henderson*, 4 Dev., N. C. 15;
Taylor vs. *Porter*, 4 Hill, 146;
Van Zant vs. *Waddell*, 2 Yerger, 260;
State Bank vs. *Cooper*, Ibid., 599;
Jones' Heirs vs. *Perry*, 10 Ibid., 59;
The People vs. *Wyjenhamer*, 3 Kernan, 378;
Norman vs. *Heint*, 5 Watts & Sergt., 193;
Hoke vs. *Henderson*, 4 Dev., 15;
Bates vs. *District of Columbia*, 1 McArthur, 433.

In the light of these authorities it is unquestionable that an act of Congress which takes away private property is not, of itself, such "due process of law" as the fifth amendment requires.

III.

The Joint Resolution was Unconstitutional and Void.

It was void because—

1. It impaired the obligation of a contract.
2. Because it took away property without due process of law.

1. It impaired the obligation of a contract.

It is true that the express inhibition of impairing the obligation of contracts is addressed to the States.

"No State shall pass any law impairing the obligation of contracts."

From the nature of the case, the Federal Government can have no such power. It is a Government of limited powers. It has none except such as are expressly granted, and such as are necessary to carry out express powers. All others are reserved to the States. The express power of passing uniform bankrupt laws is given. That authorizes interference with the obligation of contracts, and ability to wipe them out on certain conditions to be prescribed by the bankrupt law. But, if Congress had the inherent power to impair the obligation of contracts, what need was there of giving the express power? It could do it without any express authority. *Expressio*

unius exclusio alterius. There are other clauses in the Constitution which show that its framers did not intend to grant any such power. Its preamble declares that one of its main objects was to "*establish justice.*" Is justice established by permitting one of the parties to a contract to change or *annul* it, at its own sovereign pleasure, and without the consent of the other contracting party? The moral sense of every intelligent person revolts at the thought of such a thing. Madison said it could not be done. Hamilton said it could not be done, and, with a felicity of expression peculiar to himself,—

"When a Government," he observes, "enters into a contract with an individual, it deposes, as to the matter of the contract, its constitutional authority, and exchanges the character of legislator for that of a moral agent, with the same rights and obligations as an individual. Its promises may justly be considered out of its *power to legislate*, unless *in aid* of them. It is, in theory, impossible to reconcile the two ideas of a *promise which obliges* with a power to *make a law which can vary the effect of it.*" (Hamilton's Works, Vol. 3, p. 518.)

The courts have expressed like views. In *Commonwealth* vs. *The Proprietors of New Bedford Bridge*, 2 Gray, 350, the Supreme Court of Massachusetts, speaking in reference to a contract between the State and the defendant, said:

"Each has equal rights and privileges under it, and neither can interpret its terms authoritatively, so as to control and bind the rights of others. The Commonwealth has no more authority to construe the charter than the corporation. By becoming a party to a contract with its citizens the Government divests itself of its sovereignty in respect to the

terms and conditions of the contract and its construction and interpretation, and stands in the same position as a private individual. If it were otherwise, the rights of parties, contracting with the Government, would be held at the caprice of the sovereign, and exposed to all the risks arising from the corrupt or ill-judged use of misguided power."

In *Calder* vs. *Bull*, 3 Dall., 388, Mr. Justice CHASE said that there were acts which the Federal and State legislatures could not do without exceeding their authority; and among them he mentioned a law which punished a citizen for an innocent act; *a law that destroyed or impaired the lawful private contracts of citizens;* a law that made a man a judge in his own case; a law that took the property from A and gave it to B.

"It is against all reason and justice," he observed, "for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it. They may command what is right and prohibit what is wrong, but they cannot change innocence into guilt, or punish innocence as a crime, *or violate the right of an antecedent lawful contract*, or the right of property. To maintain that a Federal or State legislature possess such powers, if they had not been expressly restrained, would, in my opinion, be a political heresy altogether inadmissible in all free governments."

In *Ogden* vs. *Saunders*, 12 Wheaton, 213, Mr. Justice Thompson, referring to the clause of the Constitution prohibiting a State from passing a bill of attainder, an *ex-post facto law*, or a law impairing the obligations of a contract, said:

"Neither provision can strictly be considered as introducing any new principle, but only for greater security and safety to incorporate into this charter provisions admitted by all to be among the first principles of our Government. No state court would, I presume, sanction and enforce an *ex-post facto law*, if no such prohibition was contained in the Constitution of the United States, so neither would retrospective laws, taking away vested rights, be enforced. *Such laws are repugnant to those fundamental principles upon which every just system depends.*"

In *Wilkinson* vs. *Leland*, 2 Pet., 657, the Court, said:

"That Government can scarcely be deemed to be free, where the rights of property are left solely dependent upon the will of a legislative body, without any restraint. The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country, would be warranted in assuming, that the power to violate and disregard them, a power so repugnant to the common principles of justice and civil liberty, lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention."

The Supreme Court has very recently, in one of its most considered cases, affirmed the doctrine that Congress cannot impair the obligation of a contract.

In the *Sinking Fund Cases*, 99 U. S., 718, Chief Justice WAITE, who delivered the opinion of the Court, said:

"The United States cannot any more than a State interfere with private rights, except for legitimate governmental purposes. They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts, but, equally with the States, they are prohibited from depriving persons or corporations of property without due process of law. They cannot legislate back to themselves, without making compensation, the lands they have given this corporation to aid in the construction of its railroad. Neither can they, by legislation, compel the corporation to discharge its obligations, in respect to the subsidy bonds, otherwise than according to the terms of the contract already made in that connection. The United States are as much bound by their contracts as are individuals. If they repudiate their obligations it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State, or a municipality, or a citizen. No change can be made in the title created by the grant of the lands, or in the contract for the subsidy bonds, without the consent of the corporation. *All this is indisputable.*"

This citation of authorities is sufficient to show that Congress cannot, any more than a State, pass a law impairing the obligation of a contract.

The important question then arises, does the Joint Resolution impair the obligation of the previous contract?

That it does, is beyond a reasonable doubt.

It impairs the obligation of the contract *by abridging and taking away the remedy, given by the contract, and by not giving any other adequate or sufficient remedy.*

The mode of securing the benefits granted by the act is the issuance of the eighty acre certificates of

location by the Commissioner of the General Land Office. That is *the remedy*. It requires but little knowledge of the land system of the United States to know that this provision is all important. Without it, the most learned land official would be at a loss to know how to execute the law. With it the mode is exceedingly simple. The duty is cast upon the Commissioner to issue the certificates. When they are issued their location is readily accomplished.

Now, what is the effect of this Joint Resolution? It directs the Secretary of the Interior, who is the official superior of the Commissioner, to see that these certificates are not issued until the "further order" of Congress, and never unless Congress shall make such "further order."

That certainly is interfering with the remedy given by the law. The law says that the Commissioner shall issue the certificates; that he shall do it at once, with all convenient dispatch. The Joint Resolution says you shall not do it at once. You shall not do it at all unless hereafter you are directed by Congress so to do. We will not argue the question that it is a change in the rights of the widow and children. It is too plain for argument. Its mere statement is its argument.

Congress had no power to make such a change. If anything can be said to be settled by the oft repeated decisions of the Supreme Court, then this question is settled beyond the power of even a doubt. We will call attention to some of them.

In *Green* vs. *Biddle*, 8 Wheaton, 92, this subject was elaborately discuseed. The controversy grew out of a compact between the States of Virginia and

Kentucky. It was made in contemplation of the separation of the territory of the former, and its erection into a State, and is contained in an act of the Legislature of Virginia, passed in 1789, whereby it was provided—

"That all private rights and interests within the district of Kentucky derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State."

By two acts of the Legislature of Kentucky, passed respectively in 1797 and 1812, several new provisions relating to the consequences of a recovery in the action of ejectment—all eminently beneficial to the defendant—were adopted into the laws of that State. So far as they affected the lands covered by the compact, the court declared them void.

It said:

"It is no answer that the acts of Kentucky, now in question, are regulations of the remedy, and not of the right to the lands. If these acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation of the compact as if they *overturned* his rights and interests.

"Nothing, in short, can be more clear, upon principles of law and reason, than that a law, which denies to the owner of land a remedy to recover the possession of it, when withheld by any person, however innocently he may have obtained it; or to recover the profits received from it by the occupant; or which clogs his recovery of such possession and profits by conditions and restrictions, tending to di-

minish the value and amount of the thing recovered, impairs his right to, and interest in the property.

"The objection to a law, on the ground of its impairing the obligation of a contract, can never depend upon the extent of the change which the law effects in it. Any deviation from its terms, *by postponing* or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with the performance of those which are, however minute, or apparently immaterial, in their effect upon the contract of the parties, impairs its obligation."

In *Bronson* vs. *Kinzie*, 1 How., 311, the same principle was again asserted. A mortgage was executed in Illinois containing a power of sale. Subsequently an act of the legislature was passed which required mortgaged premises to be sold for not less than two-thirds of their appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute, by thus changing pre-existing remedies, impaired the obligations of the contract, and was therefore void.

In *McCracken* vs. *Howard*, 2 How., 908, it was held that a statutory provision, that personal property should not be sold under execution for less than two-thirds of its appraised value, was void as to all antecedent contracts.

The Court said:

"The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and form a part of them as the measure of the obligation to perform them by the one party, and the right acquired

by the other * * * * * * If any subsequent law affect to diminish the duty or to impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the right accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution. * * * * * These laws giving these rights were as perfectly binding on the defendant, and as much a part of the contract as if they had been set forth in its stipulations in the very words of the law relating to judgments and executions. * * * * Any subsequent law which denies, obstructs or impairs this right, by superadding a condition that there shall be no sale for any sum less than the value of the property levied upon, to be ascertained by appraisement or any other mode of valuation than a public sale, affects the obligation of the contract, as much in the one case as the other; for it can be enforced only by a sale of the defendant's property, and the prevention of such sale is the denial of a right."

In *Planter's Bank* vs. *Sharp*, 6 How., 327, the court said:

"One of the tests that a contract has been impaired is, that its value has, *by legislation, been diminished. It is not, by the Constitution, to be impaired at all. This is not a question of degree or manner or cause, but of encroaching in any respect on its obligation, dispensing with any part of its force.*"

In *Von Hoffman* vs. *City of Quincy*, 4 Wall., 535, it was held that when a statute had authorized a municipal corporation to issue bonds and exercise the power of local taxation in order to pay them, the power of taxation, thus given, was a contract within

the meaning of the Constitution, and that a subsequent statute, which repealed or restricted the power of taxation, was unconstitutional and void.

The Court said, page 552:

"Nothing can be more material to the obligation than the means of enforcement. Without the remedy the contract may, indeed, in the sense of the law, be said not to exist, and its obligation to fall within the class of those moral and social duties which depend for their fulfilment wholly upon the will of the individual. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against invasion. The obligation of a contract 'is the law which binds the parties to perform their agreement.' The prohibition has no reference to the degree of impairment."

In *Walker* vs. *Whitehead*, 16 Wall., 314, it was held that the laws which exist at the time of making a contract enter into and make part of it; and consequently that a law, passed subsequent to the contract, which required as a condition of plaintiff's recovery on a promissory note that he should prove that he had paid taxes on the note for each year since it was given, impaired the obligation of the contract, and was void.

The Court said:

"These propositions may be considered consequent axioms in our jurisprudence;

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement;

"Nothing is more material to the obligation of a contract than the means of enforcement. The ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment;

"The obligation of a contract 'is the law which binds the parties to perform their agreement';

"Any impairment of the obligation—the degree of impairment is immaterial—is within the prohibition of the Constitution;

"The States may change the remedy, provided no substantial right, secured by the contract, is impaired. Whenever such a result is produced by the act in question, to that extent it is void. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made.' The guarantee of the Constitution gives it protection to that extent."

In *Terry* vs. *Anderson*, 95 U. S., 628, and *Tennessee* vs. *Sneed*, 96 U. S., 69, it was held that the legislature might alter statutes of limitations, in force when contracts were made, without impairing the obligation of contracts—provided that a reasonable time was given for the commencement of suit before the law took effect.

The same principle is affirmed in *Louisiana* vs. *Pilsbury*, 105 U. S., 301.

In *Fish* vs. *Jefferson Police Jury*, 116 U. S., 131, the Court held that a public officer who had performed services was entitled to all the remedies for the collection of his debt that existed at the time the ser-

vices were rendered, and that the change in the remedy, made by a change in the constitution of the State, as to the degree of taxation, was unconstitutional and void, and that implied contracts were as much protected as express contracts.

In *Seibert* vs. *Lewis*, 122 U. S., 284, the Court held that the subsisting remedy was a part of the contract, and that the statute in existence at the time the contract was made, which provided that a tax should be levied in the same manner as county taxes with which to pay bonds issued by any municipal corporation, for the construction of railroads, was in force although the statute itself had been repealed.

The decisions which have been cited show that the Supreme Court, from its earliest history, down to the present day, has persistently and unhesitatingly maintained the doctrine that the remedy was a part of the contract and that it could not be taken away, suspended or abridged without impairing the obligation of the contract, no matter whether it was sought to be done by a statute or a constitution. And they have done this, when the remedy was not contained in the contract but was found in the general laws. How much more will it protect and defend the remedy when it is, in express terms, found in the contract itself? That is the case in the matter now under consideration. The statute—the contract—provides expressly the remedy by which it shall be satisfied—that the Commissioner shall issue the certificates.

2. The Joint Resolution was void because it took away property without due process of law.

It has already been shown that the interest given to the widow and children by the act of March 2, 1867, was property ; and it has also been shown that the fifth amendment prohibits the taking of property without "due process of law," and what is meant by that phrase.

The citation which has already been made from the opinion of the court in the *Sinking Fund Cases* establishes the proposition that anything which impairs the obligation of a contract is a taking of property without due process of law.

The authorities already cited show that an act of Congress is *not* due process of law.

In this connection attention is called to the case of *Fletcher* vs. *Peck*, *supra*. Chief Justice MARSHALL said :

"When, then, a law is, in its nature, a contract ; when absolute rights have vested under that contract, a repeal of the law cannot divest those rights. * * * It is then the unanimous opinion of the Court that * * * the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."

In *Terret et al.* vs. *Taylor*, 9 Cranch, 43, the Court said :

"If the legislature possessed the authority to make such a grant, and confirmation, it is very clear to our minds that it vested an indefeasible and irrevocable title. We have no knowledge of any authority or principle which could support the doctrine that a

legislative grant is revocable in its own nature and held only *durante bene placito*. Such a doctrine would uproot the very foundations of almost all the land titles in Virginia, and is utterly inconsistent with a great and fundamental principle of republican government, the right of the citizens to the free enjoyment of their property legally acquired."

In *Wilkinson* vs. *Leland*, 2 Pet., 657, the Court reaffirmed this doctrine, it said :

"In *Ferret* vs. *Taylor*, 9 Cranch, 43, it was held by this Court, that a grant or *title* to lands, *once made by the legislature* to any person or corporation, *is irrevocable and cannot be resumed by any subsequent legislative act; and that a different doctrine is utterly inconsistent with the great and fundamental principle of a republican government, and with the right of the citizens to the free enjoyment of their property lawfully acquired.*"

In *Rice* vs. *Railroad Company*, 1 Black., 358, the Court admitted the doctrine to its fullest extent that a right which had once been vested under an act of Congress could not be divested by a repeal of the act. In this case the repealing act was passed at the *same* session as the granting act.

The Court said :

"Argument is not necessary to show that those questions arise in the case, because, if the defendants acquired such a right, title or interest in the lands, under their original charter, then, *it is clear that it became a vested interest as soon as the act of Congress went into effect;* and, on that state of the case it would be true, as contended by the defendants, that the repealing act set up in the replication of the plaintiff is void and of no effect. *Terret* vs.

Taylor, 9 Cranch, 43; *Paulet* vs. *Clark*, 9 Cranch, 292."

But the Court held that no interest passed by the original act, and therefore that it might be repealed before any interest was acquired.

Attorney General Bates said:

"Permit me to remark that a grant of public land by *statute* is the highest and strongest form of title known to our law. It is stronger than a patent, for a patent may be annulled by the judiciary upon a proper case shown of fraud, accident or *mistake*; while *even Congress cannot repeal a statutory grant.*" Opinions, 11, 49.

It is greatly to the credit of Congress that it has rarely undertaken to interfere with vested rights by an act of its own.

We know of no case in which it was attempted, except the one now under consideration and the one which came before the Supreme Court for construction in the case of *Reichart* vs. *Felps*, 6 Wall., 160.

That was as follows: In 1784, after the war of the Revolution, the State of Virginia, then claiming the Northwest Territory, a part of which makes the now State of Illinois, and in which, from early times, inhabitants of Canada, while Canada was yet a French province, had settled, yielded her claim and title in the Territory of the United States on condition—

"That the French and Canadian inhabitants, and other settlers of the Kaskaskias, St. Vincents, and the neighboring villages who have professed themselves citizens of Virginia, shall have their *possessions and titles* confirmed to them, and be protected in the enjoyment of their rights and liberties."

On the 20th of June, 1788, Congress provided that ancient settlers should be confirmed in the possession of the lands they had in the beginning of the Revolution, and that the Governor of the Northwestern Territory should be instructed to examine the titles and possessions of the settlers and determine what they were severally entitled to. Under this authority he examined and gave a certificate to one Janot of a particular tract. The title of Janot was duly transferred to the defendant, Felps.

On the 20th of February, 1812, Congress passed an act authorizing a Board of Commissioners to revise and re-examine the confirmations made by the Governor. That board reported against the Janot claim, and the Land Department afterwards offered the land at public sale when the plaintiff, Reichart, purchased it and received a patent therefor.

The Supreme Court made short work of disposing of the case. It said:

"Congress is bound to regard the public treaties, and *it had no power* to organize a board of revision to *nullify titles confirmed many years before by the authorized agent of the Government.*"

This case was decided at the December Term, 1867, which was soon after the passage of the joint resolution.

If the question of the power of Congress to pass that resolution had been called to its attention and considered by it, the presumption is great that it would not have adopted it. The debates show that no one even suggested it.

Upon the whole case, as thus presented, it is clear that the Joint Resolution is unconstitutional and

void, and, being such, it is the duty of every tribunal or officer of the Government to treat it as such, and act accordingly.

Being void, it is a nullity, and is as though it never had been passed.

In the great case of *Osborn* vs. *The Bank of the United States*, 9 Wheat., 738, Chief Justice MARSHALL said:

"The counsel for the appellants are too intelligent, and have too much self respect, to pretend, that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot."

Such is the rule laid down in *Von Hoffman* vs. *City of Quincy*, *supra*, 4 Wall., 555.

The Court directed the authorities to treat the act abridging their powers of taxation as a nullity, and to proceed to levy the tax as though it had never been passed. The Court below refused the application for mandamus, and for that error the Supreme Court reversed its judgment.

In *Board* of *Liquidation* vs. *McComb*, 92 U. S., 541, the Court said:

"A court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But, it has been well settled, that, when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by some positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it.

In such case the writs of *mandamus* and injunction are somewhat correlative to each other. *In either case, if the officer plead the authority of an unconstitutional law, for the non-performance or violation of his duty, it will not prevent the issuing of the writ. An unconstitutional law will be treated by the courts as null and void. Osborn* vs. *Bank of the United States*, 9 Wheat., 859. *Davis* vs. *Gray*, 16 Wall., 220."

In the *Virginia Coupon cases*, 114 U. S., 293, the Court said:

"The true and real commonwealth which contracted the obligation is incapable in law of doing anything in derogation of it. Whatever having that effect, if operative, has been attempted or done, is the work of its government acting without authority, in violation of its fundamental law, and must be looked upon *in all courts of justice as if it were not, and never had been.*"

In the very late case of *Norton* vs. *Shelby County*, 118 U. S., 442, the Court said:

"An unconstitutional act is not *a law; it confers* no rights; *it imposes no duties*; it affords no protection; it creates no office; *it is, in legal contemplation, as in-operative as though it had never been passed.*"

If it "imposes no duties," and is "as inoperative as though it had never been passed," it certainly cannot be used to excuse the Commissioner of the General Land Office or the Secretary of the Interior from issuing this scrip. They are quasi judicial officers, and their decisions and judgments are entitled to the same respect and effect as those of other

judicial officers. This has been so often declared by the Supreme Court that it would be idle to take up time in referring to the decisions. They have the power and the right to declare an act of Congress unconstitutional.

STORY says:

"The Constitution contemplating the grants of limited powers and distributing them among various functionaries, and the State governments with their functionaries, being clothed with limited powers, subordinate to those granted to the General Government, whenever any question arises, as to the exercise of any power by any of these functionaries, under the State or Federal Government, it is of necessity, that such functionaries must in the first instance decide upon the constitutionality of the exercise of such power. It may arise in the course of the discharge of the functions of any one, or of all, of the great departments of Government, the Executive, the Legislative and the Judicial. The officers of each of these departments are equally bound by their oaths of office to support the Constitution of the United States, and are therefore bound to abstain from all acts which are inconsistent with it. Whenever, therefore, they are required to act in a case, not hitherto settled by any proper authority, these functionaries must at the first instance decide, each for himself, whether consistently with the Constitution the act can be done." 1 Story, Const., § 374.

This question was presented to Attorney General Bates by the Secretary of the Interior, Caleb B. Smith. He answered as follows:

"The fourth question concerns the power of an Executive Department to examine and decide upon the validity of an act of Congress, and to disregard its provisions.

"There may possibly arise cases of plain and obvious conflict between the provisions of the Constitution and the provisions of a statute. In such cases there is no room for construction, no ground for argument, and in all such cases, not only the Judiciary Department, but every Department, and indeed every private man, who is required to act upon the subject matter, must determine for himself what the law of the land, as applicable to the case in hand, really is. He must obey the law, the whole law; and if the conflict between the Constitution and the act of Congress—the higher and the lower law—be plain and unquestionable, he must, of necessity, disregard the one or the other. He cannot disregard the Constitution, for that is the supreme law; and therefore he must obey the Constitution, even though, in doing so, he must disregard a statute. The Constitution is the highest and strongest law of all, and therefore the lower and weaker law must yield to it in every case, before every tribunal, high or low, judicial or executive. This is predicated of cases where the conflict of law is plain and obvious." 10 Opinions, 61.

Attorney General Black, in advising the President as to his duty as an executive officer, said:

"Every law is to be carried out, *so far as it is consistent with the Constitution, and no further. The sound part of it must be executed and the vicious portion of it suffered to drop.*" 9 Opinions, 469.

This is good law. An officer cannot be legally bound to do two things which are inconsistent with each other.

There is no such thing as a joint allegiance to two powers which are in conflict. He must cleave to the one and reject the other.

Let us illustrate what we mean. Suppose, for the sake of the argument, that the Constitution expressly

provided that Congress should not have the power to make a donation to any individual of any of the public lands of the United States. Now, suppose Congress should pass a law donating to the general-in-chief of the army a given section of the public lands and directing the Secretary of the Interior to issue a patent therefor, can there be any doubt as to the duty of the Secretary?

Would not his oath of office require him to obey the Constitution and reject the act of Congress?

Every lawyer must answer, it would.

In the case put the conflict is plain. It is made plain by the express words of the Constitution. In the case at bar the conflict is equally plain. It is made plain, not by the express words of the Constitution, but by the oft-repeated decisions of the Supreme Court, the tribunal which is authorized to expound the Constitution and declare what it does mean. When the conflict plainly appears from the construction given by the Supreme Court, the duty of obedience, by all, is identical with that enjoined by express words. The obligation, in both cases, is the same.

An analysis of all, and singular, the cases in the Supreme Court, in which the constitutionality of the law has been raised and considered, will show that the Court has directed all persons, or officers who were required to act under it, to disregard the unconstitutional law, and act as though it had never existed.

It has required them, by mandamus, so to do. *Von Hoffman* vs. *The City of Quincy*, 4 Wall., 555; *Hartman* vs. *Greenhow*, 102 U. S., 685.

We think we have made good every proposition announced at the commencement of our argument, and trust that we have satisfied your Honors that the law requires you to grant our application for a mandamus.

WALTER H. SMITH,
A. T. BRITTON,
A. B BROWNE,
S. W. JOHNSTON,
Att'ys for Petitioner.

129 — 479
129 — 493
129 — 503
129

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 1442.

G. W. NORTON, PLAINTIFF IN ERROR,

vs.

THE BOARD OF COMMISSIONERS OF THE TAXING DISTRICT OF THE CITY OF BROWNSVILLE.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED NOVEMBER 23, 1888.